

JERSEY / JUDGMENT

C v D [2000] JRC 185A (19 September 2000)

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JUDGMENT

THE COMMISSIONER: 1. This is an application by 'C' now aged 36, for access to his son 'M', now aged nearly 6. 2. M is the offspring of a relationship which began in 1991 when C began to cohabit with M's mother 'D' who already had two daughters born in 1986 and 1988, by a previous relationship. The parties never married. 3. It is clear from the Plaintiff's account, and the admissions he made in evidence, that the relationship was a stormy one. As described by the Plaintiff, they both had mood swings; they would argue. In cross-examination the Plaintiff put it in this way, that they had got into arguments, that she attacked him and he struck her. He denied drinking heavily though he admitted to four to five pints and put it in this way, that they would drink together and would argue together. 4. At all events C agreed that he had hit D three times and although he was not sure of the dates, had been once put on probation and twice sent to prison. The first of these assaults took place in 1992, well before D became pregnant with M and following this, on 16 th September, 1992, she obtained an interim ouster and non-molestation injunction. 5. C's version of what follows is that they then carried on much as before. He left the premises but they would see each other as D would come to his place at Mont Millais, quite regularly, at weekends and after her daughters were dropped at school, and that he would visit her, again at weekends, or in the evenings. The periods they spent together were, he said, quite short. When D had changes of address she would throw him out. 6. At all events, there was a further conviction in May 1993, when, despite the injunction, C returned home, found two people in his bed and a made-up bed for him. He hit her, and was sent to prison for six weeks. 7. Despite this the relationship continued, and early in 1994 D became pregnant. Whilst pregnant there was yet another incident when C smashed a glass table in the kitchen of their flat. 8. After M was born, in the Autumn of 1994, the Plaintiff states that he was in regular contact with M, handled him as much as he could, and indeed took him to the clinic on occasion. Previously, whilst D was at Highlands and prior to falling pregnant, he stated that he had looked after her daughters, taking them to school and preparing their tea. 9. In answer to an allegation that he had hit D when she was holding M, the Plaintiff absolutely denied this, as he denied hitting D in the presence of her daughters. 10. The relationship ended in 1995, since when the Plaintiff has had no access to his son. The Plaintiff claims that he left the relationship because D would take him back one minute and then throw him out again. 11. He was still, early in 1996, here, able to go, he claimed, to the hospital when M had grommets fitted, but seems shortly afterwards to have left the Island for a couple of years, before deciding to return here and consult lawyers with a view to

obtaining access. 12. He agreed that it was not appropriate to have hit D, and he now regrets it. He denies having struck her or attacked her since his return and claims that his violent behaviour in the past should give D no cause to be frightened of him now. 13. It appears that he has never maintained M. On being questioned about this, C maintained that he had maintained M while he was with D. He had given none since, stating that he had no contact with M, that if he did he was not sure M would get it that D had made it clear that he was never going to see his son and that money was never discussed. He would though contemplate maintenance if he saw M, and would send money when "all this" was sorted out. He had, he said, sent Christmas presents via his sister, who had, he said, told him that D was not interested in that. 14. Last, he was now getting some form of further education, and although it was clear to the Court that he had some reading ability, he stated that he was not yet able to write. 15. D, in her evidence, stated that the relationship started in 1991 and ended finally in 1995. 16. She confirmed that there had indeed been assaults leading on one occasion to stitches and on another to a black eye. As for the incident of the table her statement was that he had picked up the glass top and thrown it towards her. 17. There was, she said, no pattern to the violence: a lot of the time he would be pushing her around; it would happen every few weeks and then there would be a break. As to his attitude to alcohol, every Friday night his mother would leave him some money and he would drink to excess, not only beer but spirits as well and on his return home he would target her and take it out of her. He was, she said, a nasty piece of work. Her method of dealing with this was to be asleep when he returned, but this did not often work. She was, she said, terrified of him. She felt safe in Court because there were people around. 18. She flatly contradicted C's evidence that he had looked after her daughters, claiming that she had employed a childminder. 19. In cross-examination she claimed that the relationship was normal when it started, but that once he had moved in he became manipulative, and the relationship had gone wrong when he assaulted her at her sister's in 1992, following which he was imprisoned for six weeks. 20. She had obtained an injunction against him in September, 1992, and had had C removed from 157 Le Marais. Nonetheless, after an interval he returned, and despite her objections to him, he moved in again and intercourse clearly resumed, leading in due course to the birth of M in September, 1994. 21. She claimed that he forced his way back, and had stayed close to her until she felt it was too late to call for help to enforce the injunction. She was, she said, continually harassed and scared. If he hit her, he would remain close to her until the bruising disappeared and she felt it was too late to complain. 22. During her evidence she became distressed on several occasions and the Court formed the view that she was indeed genuinely distressed and anxious when in proximity to C, who had been willing and able to use his strength to hurt and frighten her during their relationship. 23. So far as M is concerned, she stated that he is not an average child. He is very bright, is hyperactive, possibly dyslexic and has hearing problems which have caused him frustration. Although with grommets his hearing has improved, she still has to speak very clearly and he can only cope with one person talking at a time. 24. She felt that access at present would undo the work done to date. At the moment, he has no knowledge of, and has made no enquiry about, his father. Were there to be access, she would, she felt, just fall apart and she and all three of her children would suffer. 25. In cross-examination she agreed that at some point she would clearly have to speak to M about his father, although she could not say how she would manage

this until the situation arises. 26. Her view was that C had never supported M and was doing this as part of a vendetta against her. At present she could see no benefit on a trial basis for supervised access. If it did not work she reiterated her fear as to the effect it would have on her and on M and on her relationship with M. M is difficult and she feared a clash of personality with his father, who she felt might abuse him verbally, although to start with C would be on his best behaviour. 27. The time, she conceded, will come, but it is emphatically not at present. When M starts to ask, she would prepare him, but at the moment her view, most emphatically, is that any form of access will not in any way benefit M. 28. In addition to the parents, the Court had the benefit of evidence from a series of experts to whom the Court is most grateful. The Plaintiff had called two experts, neither of whom had seen D or M. 29. The first was Dr Sharkey, M. B., B. Ch., D. M. H., M. R. C. Psych. Dr Sharkey clearly took trouble with his report on C and went carefully into a rather difficult background. C's desire for access was, he felt, very strong. His report was focused on C and as he very properly conceded it would be arrogant for him to give any view on D or M. As to access, he thought that C's desire for access and recourse to the Courts for access merited some sort of trial on an empirical basis to see if he could behave himself. It was though, he conceded, a grey area and one would have to hedge a decision and obtain a balance. He was, though, quite clear that he could see no psychiatric reason why C should not have access to his son. 30. He was followed by Mr. J. P. Hollywood, B. A., M. Sc., C. Psychol., A. B. Ps. S. He had met C on a number of occasions. He stated that C was a somewhat bohemian figure, suspicious of authority, but despite having heard of the mother's problems, nonetheless thought that M should have the benefit of access, which especially at first should be strictly controlled. He did, however, state that if D were very distressed by this, it would be impossible for her not to communicate this anxiety to her child; and if her mental state were to deteriorate, this would have an impact on M. In general though, and especially with boys, children do benefit from contact with their father, as otherwise one is likely to face all sorts of difficulties when they become adolescents. If contact were established, it would help M to have a father to talk about, provided, of course, that the father persevered. 31. He conceded that if he were wrong, it could be disastrous, but emphasised that, in his view, as M grows up he will become curious. It is usual, and can become overwhelming: someone he was sure would tell him who his father was e.g. at school. 32. The defence called three witnesses. The first was Mr. B. R. Bowen, B. A.(Hons); C. O. S. W; Dip. S. W; U. K. C. P. Registered Therapist, a family therapist to whom D and her family had been referred by Dr. Glaun. 33. He had first seen all her family, but had then excluded M who was not distressed and continued with D and her daughters who, he stated, were very distressed. He had seen D five times up to May, 2000, and once since (on another matter). He felt that this distress was genuine and that D was showing symptoms of post traumatic stress disorder i.e. heightened alertness, poor appetite and flashbacks, so he had referred her to a clinical psychologist. 34. He could not, very properly, give a view on the result of contact between M and his father, but affirmed in cross-examination that there would be a high level of stress to D and her daughters if access were granted. If there were supervised access then, at a guess, there would be reduced anxiety, but anxiety nonetheless. He added that there was no correlation between the degree of trauma and the reaction to it. 35. He was followed by Miss S. Reeves, B. A; M. A; Dip. Clin. Psych., a Chartered Clinical Psychologist, who confirmed the diagnosis of post traumatic stress disorder. She, too,

thought D's fear and anxiety were genuine; she had seen her startled by sounds. She had seen her six or eight times since April. If access were granted and it went well for some months her symptoms might improve. However, any increase in anxiety would have as a side effect increased irritability; it is, she said, very difficult to be patient with children whilst worrying about something else. 36. To overcome her symptoms D needed a stable environment. Access would probably cause them to increase rather than subside; and if M were distressed this would ultimately fuel D's anxieties. Even if not realistic D's fears are very strong and based on past experience. 37. To grant access would be to take a chance with D's health which might get better or worse; though she could not see D overcoming her symptoms completely if C became part of her life. If no access were granted her anxieties would subside over time, but would be rekindled by future access. 38. As to whether access would be good for M she could not say, as she had never met him. 39. Last, the Court heard Mr Castledine, a Child Care Officer of very considerable experience, who had met not only D and her children but also C. 40. When he interviewed M he found an active, or rather hyperactive child who knew he had a father but had no knowledge of him; a boy who had a good strong relationship with his mother and sisters, and who, he understood, got on well at school. 41. With both D and her daughters there was a fear factor. He believed that access would upset the stability of the whole family. At the moment he did not believe that direct access of any sort, whether supervised or not, was the best course of action. He felt though that the interest of C in his son was genuine, and he certainly took his application seriously. 42. Mr Castledine had told C of his view, which had disappointed him deeply, but when he had done so he (Mr Castledine) had offered to keep him in touch, as M would need information regarding his father when he grew up. In his view, the ideal course is that information should be provided for M and that this should not come from his mother alone. 43. In his view it was first for D to answer M's questions and he was prepared to keep in touch with D and pass on information; and equally to do the same for C, e.g. school reports, so that he would be a buffer and a repository. He would keep the information until after discussion with D, he felt it right to release it. He added that in years to come, if M were denied information, he might resent this. 44. Counsel then referred the Court to the law: 45. Mr. Chapman first referred the Court to Rayden & Jackson : Divorce and Family Matters (17 th Ed'n): s.4: 40.42 (pp.1425-30): "Principles determining contact: parental contact. The court is generally slow to deprive a parent of all contact with his or her child. It has been said that access should be regarded as a basic right of the child rather than a basic right of the parent and, save in exceptional circumstances, to deprive a child of contact with a parent is to deprive a child of an important contribution to his emotional and material growing up in the long term. An exposition of the principles governing contact is to be found in *Re O (a minor) (contact: imposition of conditions)*, which can be summarised thus: (1) Overriding all else, the welfare of the child is the paramount consideration; the court is concerned with the interests of the mother and father only 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 he 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. (5) In cases in which, for whatever reason, direct contact cannot 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. (6) The residential parent has obligations, in particular not to obstruct indirect contact. The same principles apply where the application is to resume contact after a break in contact. Much may depend upon the nature and extent of the bond between the child and his parent. This is a factor which has been highlighted in respect of children born by an artificial method and in respect of contact with step-parents. There is no principle that there should be no contact in cases of serious sexual abuse and each case must be decided on its own particular facts." 46. He further cited the headnote in *M -v- M*

[1973] 2 All ER 81: "Held - (i) No court should deprive a child of access to either parent unless it was wholly satisfied that it was in the interests of that child that access should cease, and that was a conclusion at which the court should be extremely slow to arrive. Access was to be regarded as a basic right of the child rather than a basic right of the parent. Save in exceptional circumstances to deprive a parent of access was to deprive a child of an important contribution to his emotional and material growing up in the long term. There was no distinction to be drawn between a natural parent and an adoptive one. (ii) Since the justices had clearly placed before themselves the rule that the welfare of the child was the paramount consideration, on the material before them they were fully entitled to conclude that the welfare of the child would not be promoted by the continuation of access and would be promoted by its cessation. The appeal would therefore be dismissed." 47. And the remarks of Latey, J at p.88 f-i: "...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. So viewed the cases which speak of the basic right to access of the non-custodian parent are to my mind, as Wrangham J has said, reconcilable and make sense. I do not believe that in modern times they were meant to convey any other meaning. They mean and are meant to mean not that a parent has any proprietary 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." 48. In his submission Mr. Chapman said there were no cogent reasons for the refusal of access. Domestic violence was, of itself, no bar and it was perfectly possible to reach a compromise position of indirect followed by direct access. 49. In reply Advocate Benest submitted that cases unhappily arose where contact should not be ordered. 50. He referred the Court to the recent case of *Re L (Contact: Domestic Violence)*

(2000) 2 FLR 334 and in particular to the headnote at p.334: "A court hearing a contact application in which allegations of domestic violence were raised should consider the conduct of both parties towards each other and towards the children, the effect of the violence on the children and on the residential parent, and the motivation of the parent seeking contact. On an application for interim contact, when the allegations of domestic violence had not yet been adjudicated on, the court should give particular consideration to the likely risk of harm to the child, whether physical or emotional, if contact were granted or refused. The court should ensure, as far as possible, that any risk of harm to the child was minimised and that the safety of the child and the residential parent was secured before, during and after any such contact. Family judges and magistrates needed to have a heightened awareness of the existence and consequences for children of exposure to domestic violence between their parents or other partners. Where allegations of domestic violence were made which might have an effect on the outcome, those allegations must be adjudicated upon, and found proved or not proved. There was not, and should not be a presumption that on proof of domestic violence the offending parent had to surmount a prima facie barrier of no contact, but such violence was a factor in the delicate balancing exercise of discretion carried out by the judge applying the welfare principle and the welfare checklist in s 1(1) and (3) of the Children Act 1989. In cases of proved domestic violence, the court had to weigh the seriousness of the domestic violence, the risks involved and the impact on the child against the positive factors, if any, of contact. The ability of the offending parent to recognise his past conduct, to be aware of the need to change and to make genuine efforts to do so would be likely to be an important consideration when performing that balancing exercise." 51. He then referred to the passage at 336 and 337, which, as the case is just decided, we cite at length per Dame Elizabeth Butler-Sloss, P: "Dr Sturge and Dr Glaser in their joint report to this court had the opportunity to see the responses to the Sub-Committee consultation paper and to read the report and recommendations. Their psychiatric report was read and approved by a number of other consultant child psychiatrists and incorporates the views of a distinguished group of consultants. We are extremely grateful to them for their wise advice. They set out the psychiatric principles of contact between the child and the non-resident parent. They saw the centrality of the child as all-important and the promotion of his or her mental health and the central issue amid the tensions surrounding the adults in dispute. The decisions about contact should be child-centred and related to the specific child in its present circumstances but acknowledge that the child's needs will alter over different stages of development. The purpose of the proposed contact must be overt and abundantly clear and have the potential for benefiting the child in some way. The benefits of contact to the father were set out in detail including, the importance of the father as one of the two parents, in the child's sense of identity and value, the role model provided by a father and the male contribution to parenting of children and its relevance to the child's perception of family life as an adult. They set out many different purposes of contact, including: the maintenance or reparation of beneficial relationships, the sharing of information and knowledge and the testing of reality for the child. They set out the

more limited advantages of indirect contact which included: experience of continued interest by the absent parent, knowledge and information about the absent parent, keeping open the possibility of development of the relationship and the opportunity for reparation. They pointed out the importance of the manner in which indirect contact was managed by the resident parent. They identified a number of risks of direct contact. The overall risk was that of failing to meet and actually undermining the child's developmental needs or even causing emotional abuses and damage directly through contact or as a consequence of the contact. Specifically that included: escalating the climate of conflict around the child which would undermine the child's general stability and sense of emotional well being." 52. He further cited Dr Sturge and Dr Glaser's report at 339 C-H: "Domestic violence involves a very serious and significant failure in parenting - failure to protect the child's carer and failure to protect the child emotionally (and in some cases physically - which meets any definition of child abuse). Without the following we would see the balance of advantage and disadvantage as tipping against contact: (a) some (preferably full) acknowledgement of the violence; (b) some acceptance (preferably full if appropriate, i.e. the sole instigator of violence) of responsibility for that violence; (c) full acceptance of the inappropriateness of the violence particularly in respect of the domestic and parenting context and of the likely ill-effects on the child; (d) a genuine interest in the child's welfare and full commitment to the child, i.e. a wish for contact in which he is not making the conditions; (e) a wish to make reparation to the child and work towards the child recognising the inappropriateness of the violence and the attitude to and treatment of the mother and helping the child to develop appropriate values and attitudes; (f) an expression of regret and the showing of some understanding of the impact of their behaviour on their ex-partner in the past and currently; (g) indications that the parent seeking contact can reliably sustain contact in all senses." They suggested that without (a)-(f) above they could not see how the non-resident parent could fully support the child and play a part in undoing the harm caused to the child and support the child's current situation and need to move on and develop healthily. There would be a significant risk to the child's general well-being and his emotional development ([2000] Fam Law 615, 624)." 53. And a further passage at 341H-342F where Dame Elizabeth Butler-Sloss, P went on to state: "In a contact or other s 8 application, where allegations of domestic violence are made which might have an effect on the outcome, those allegations must be adjudicated upon and found proved or not proved. It will be necessary to scrutinise such allegations which may not always be true or may be grossly exaggerated. If, however, there is a firm basis for finding that violence has occurred, the psychiatric advice becomes very important. There is not, however, nor should there be, any presumption that, on proof of domestic violence, the offending parent has to surmount a prima facie barrier of no contact. As a matter of principle, domestic violence of itself cannot constitute a bar to contact. It is one factor in the difficult and delicate balancing exercise of discretion. The court deals with the facts of a specific case in which the degree of violence and the seriousness of the impact on the child and on the resident parent have to be taken into account. In cases of proved domestic violence, as in cases of other proved

harm or risk of harm to the child, the court has the task of weighing in the balance the seriousness of the domestic violence, the risks involved and the impact on the child against the positive factors (if any), of contact between the parent found to have been violent and the child. In this context, the ability of the offending parent to recognise his past conduct, be aware of the need to change and make genuine efforts to do so, will be likely to be an important consideration. Wall J in *Re M (Contact: Violent Parent)* [1999] 2 FLR 321 suggested at 333 that often in cases where domestic violence had been found, too little weight had been given to the need for the father to change. He suggested that the father should demonstrate that he was a fit person to exercise contact and should show a track record of proper behaviour. Assertions, without evidence to back it up, may well not be sufficient. In expressing these views I recognise the danger of the pendulum swinging too far against contact where domestic violence has been proved. It is trite but true to say that no two child cases are exactly the same. The court always has the duty to apply s 1 of the Children Act 1989 that the welfare of the child is paramount and, in considering that welfare, to take into account all the relevant circumstances, including the advice of the medical experts as far as it is relevant and proportionate to the decision in that case. It will also be relevant in due course to take into account the impact of Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 on a decision to refuse direct contact. The propositions set out above are not, in my view, in any way inconsistent with earlier decisions on contact. The fostering of a relationship between the child and the non-residential parent has always been and remains of great importance. It has equally been intended to be for the benefit of the child rather than of the parent. Over the last 40 years there has been a movement away from rights towards responsibilities of the parents and best interests of the child." 54. And last, on this case, the question of harassment dealt with at 344 A-D which he submitted might be a factor in this case, again per Dame Elizabeth Butler-Sloss, P: "In conclusion, on the general issues, a court hearing a contact application in which allegations of domestic violence are raised should consider the conduct of both parties towards each other and towards the children, the effect on the children and on the residential parent and the motivation of the parent seeking contact. Is it a desire to promote the best interests of the child or a means to continue violence and/or intimidation or harassment of the other parent? In cases of serious domestic violence, the ability of the offending parent to recognise his or her past conduct, to be aware of the need for change and to make genuine efforts to do so, will be likely to be an important consideration." 55. Finally, Advocate Benest cited *Re K (Contact: Mother's Anxiety)*

[1999] 2 FLR 703 at 707D-708G (where the facts are of quite a different order) per Wall, J: "The question of injury to the welfare of the child is best summarised by an extract from the judgment of Waite LJ in a case called *Re D (A Minor) (Contact: Mother's Hostility)* [1993] 2 FLR 1, where at 7G the Lord Justice said this: 'It is now well settled that the implacable hostility of a mother towards access or contact is a factor which is capable, according to the circumstances of each particular case, of supplying a cogent reason for departing from

the general principle that a child should grow up in the knowledge of both his parents. I see no reason to think that the judge fell into any error of principle in deciding, as he clearly did on the plain interpretation of his judgment, that the mother's present attitude towards contact puts D at serious risk of major emotional harm if she were to be compelled to accept a degree of contact to the natural father against her will'. Citing that passage with approval in *Re O*, Sir Thomas Bingham MR drew attention to the judge's reference to a 'serious risk of major emotional harm', and went on to say that the court should not at all readily accept that the child's welfare would be injured by direct contact. Judging that question, he said, the court should take a medium-term and long-term view of the child's development and not accord excessive weight to what appears likely to be short-term or transient problems. Neither parent, he said, should be encouraged or permitted to think that the more intransigent, the more unreasonable, the more obdurate and the more uncooperative they are the more likely they are to get their own way." 56. The law we are to apply is thus quite clear. M's interests are paramount and unless there are very strong reasons why access should not be ordered, such an order should be made. 57. One such reason at least is where the mother is so traumatised that such an order would upset the stability of the family. In *Re K* the actions of the father were clearly disgraceful, and although C's behaviour is nothing like so bad, we bear in mind that there are a number of admitted assaults and that the level of stress and anxiety attested to by D and the witnesses who have seen her is genuine and that any order for access would greatly harm the family unit and all its members, not least M. We accept this and in our view the evidence is all one way. 58. The Court therefore finds that there should be no direct access whether supervised or unsupervised until further order. 59. We wish to add, though, that indirect contact is not only desirable but essential. It is most important that Mr Castledine's services are employed by both the parents and that M should grow up in the knowledge of who his father is; and it is further important, for M's sake, that his father should be kept informed of what is happening to his son. On this point although, per Mr Castledine, it is first for D to answer M's questions, he was clear that information should not only come from D. 60. The Court agrees with that view and it is further our view that D should enlist Mr Castledine's help in dealing with the questions as and when they arise. 61. It is further the Court's view that the problem of dealing with such questions as will be raised by M are better dealt with sooner rather than later, and particularly before they are raised as a result of remarks e.g. at school. 62. It is difficult, of course, for anyone to put a timescale on this, and in order that this should not be allowed to lapse, the Court orders that Mr Castledine should report to the Court in six months and thereafter every six months until further order. 63. Last, there will be liberty to either party to apply whenever there is a substantial change of circumstances. Authorities Rayden & Jackson on Divorce and Family Matters (17 th Ed'n): s.4 (pp. 1425-1430). *M -v- M* [1973] 2 All ER 81. *Re H (Minors) (Access)* [1992] 1 FLR 148. *Re L (Contact: Domestic Violence)*

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