Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence) [2000] FLR 334.

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Introduction

[1]I have read the judgments of the President, Thorpe LJ and Waller LJ and I agree that all four appeals should be dismissed. Before addressing the specific appeals before the court, however, I would like, as the other judges have done, to make some general comments regarding the way in which contact cases, and more specifically contact cases where there are allegations of domestic violence, should be approached by the courts. In particular I would like to take this opportunity for some re-evaluation of the emphasis placed by courts on contact in their efforts to safeguard children's well-being.

The presumption in favour of contact

[2]The fundamental principle in contact disputes is that the welfare of the child is the paramount consideration. As the court in *Re O (A Minor) (Contact: imposition of conditions*) [1995] 2 FLR 124 at 128-130 made clear, the interests of the mother and the father can be considered only insofar as they bear on the welfare of the child. This approach has not been altered by the advent of the Human Rights Act 1998. In *Dawson* v *Wearmouth* [1999] 1 FLR 1167 Lord Hobhouse of Woodborough said at 1182 that nothing in the European Convention on Human Rights requires the court to act otherwise than in the best interests of the child. (See also *Re KD (A Minor) (Ward: Termination of Access)* [1998] 1 All ER 577 at 588).

[3]For many years now the courts have regarded it as axiomatic that, if parents divorce or decide to live separately, children ought to have contact with the parent who is living apart from them; to order contact in contact disputes is normally thought to be in the child's best interests. Indeed the courts have considered contact so important that they have disregarded the distress that their orders cause to many children and resident parents.

[4]In *M* v *M* [1973] 2 All ER 81, for example, Latey J, at p.88, conceded that 'access…often results in some upset to the child' but assumed that these upsets are 'usually minor or superficial'. They are:

> heavily outweighed by 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….

He stated at p 85 that no court should deny access unless 'wholly satisfied' that this would be in the child's best interests and that this is a conclusion at which a court should be slow to arrive. Latey J's views appear to have become accepted wisdom and in later cases, the courts have gone further and constructed what was described in *Re M (Contact: Welfare Test)* [1995] 1 FLR 27 at p 281 as a 'strong presumption' in favour of contact. A number of other reported cases referring to such a presumption are listed by Thorpe LJ in his judgment here.

[5]The presumption is perhaps most clearly articulated in *Re H (Minors) (Access)* [1992] 1 FLR 148. Balcombe LJ said that the court should ask the question: 'Are there 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?' (152). Similarly in *Re O (Contact: Imposition of Conditions)* [1995] 2

FLR 124 at 128, the court took the view that it is 'almost always' in the interests of the child to have contact with the non-resident parent.

[6]This court has had the opportunity to read the report of the Advisory Board on Family Law: Children Act Sub-Committee, *A Report to the Lord Chancellor on the Question of Parental Contact in Cases where there is Domestic Violence* (12 April 2000). This document too appears to endorse the view that there is a presumption in favour of contact; the majority of those responding to the consultation agreed that 'in the absence of evidence to the contrary' contact is in children's best interests.

Child welfare knowledge and the presumption or assumption in favour of contact.
[7] Thorpe LJ in his judgment in this case argues that use of the term 'presumption' could detract from the welfare assessment. He accordingly prefers the term 'assumption'. He goes on to suggest that the assumption that children benefit from contact with the non-resident parent is drawn from current opinion among the majority of mental health specialists. Both he and Butler-Sloss P have relied extensively in their judgments on the expert report compiled for this court by Drs Sturge and Glaser. I intend to do the same but I will also refer to socio-legal studies in the field.

[8]My reading of the available research, however, brings into question the proposition that the courts should make decisions on the basis of an assumption in favour of contact. Arguably, such an assumption could be justifiable if it reflected a consensus among researchers about the welfare of a significant majority of children in a similar position to those whose cases come before the courts. However, there is no such consensus and the evidence presented to this court does not give unqualified support for contact either.

[9]The expert psychiatric report by Drs Sturge and Glaser provides support for the proposition that contact generally benefits children where the child's relationship with the non-resident parent is a positive one and the quality of the contact is good. Similar findings can be seen in a well-known book by Judith Wallerstein and Joan Kelly which is often cited in support of the advantages of contact: (*Surviving the Breakup*, Grant McIntyre (1980)). However the experts' report draws attention to a number of disadvantages of contact. Among the many risks they enumerate are the risks of emotional abuse, of undermining the child's sense of stability and of the continuation of unhealthy relationships. In addition, my understanding of Dr Trowell's response to Wall J's consultation paper differs from that of Thorpe LJ. Dr Trowell states that for *most* children, *regular* contact is beneficial. This by no means confirms the assumption that it is good for almost all children. Nor does it endorse contact where contact is sporadic and unreliable.

[10] These sources do not, therefore, unequivocally support either a presumption or an assumption that contact is almost always in the child's best interests. It is my view that the courts and court welfare officers alike have been emphasising the importance of contact to an extent not warranted by the available research evidence and that they have paid little attention to studies that cast doubt on their approach. For instance, in a well-known analysis of 92 studies on children's well being in the context of divorce, Paul Amato and Bruce Keith found that 'the evidence is not strong that continued contact with the noncustodial parent improves children's well-being' (in 'Parental Divorce and the Well-Being of Children; A Meta-Analysis' ((1991) 110 *Psychological Bulletin* 26 at 39). This is not an isolated view and Hale LJ recently acknowledged extra-judicially that the research does not clearly demonstrate the

importance to children of maintaining or creating a new relationship with non-resident fathers (in 'The View from Court 45' [1999] *CFLQ* 377).

[11]Dr Sturge and Dr Glaser state, in their report, that decisions about contact must relate to the specific child in question with his or her individual needs and that these may change over time. When evaluating the advantages of contact, they say, it is necessary to consider both the child's past experiences and the ability of the non-resident parent to 'understand and respond appropriately' to the child's needs. They explain that the best arrangements are those that are supported by both parents and that enable the child's needs to be 'consistently' met. However, they point out, these types of arrangements are unlikely to be achieved in contested contact cases. In such cases it becomes important to balance the potential benefits and detriments of contact.

[12]When dealing with contested contact cases, it is important to bear in mind the effects of parental conflict. Bryan Rodgers and Jan Pryor's analysis of the available research shows widespread acceptance of the view that conflict between parents is not conducive to children's well-being (in *Divorce and Separation. The Outcomes for Children*, Joseph Rowntree Foundation (1998)). Most parents make their own arrangements without resorting to litigation; contested contact cases tend to be cases in which conflict levels are high. The cases which come to court are, it would seem, those that are not susceptible to resolution by negotiation or mediation. And research conducted by Mavis Maclean and John Eekelaar indicates that, while some parental relationships improve over time, many do not (*The Parental Obligation*, Hart Publishing (1997) pp 123ff). Rogers and Pryor report that post-separation conflict can have an adverse impact on children and this is particularly true if the conflict is expressed in the form of verbal or physical abuse, if the conflict is poorly resolved or if the child feels 'caught in the middle' (at p41). Amato and Keith found conflict to be the most significant factor affecting children's well-being and suggest that, because conflict persists after divorce, children tend to show little improvement over time (1991 at p 40). Even the work referred to by Thorpe LJ and cited by Dr Trowell (Dowling and Gorrell-Barnes *Working with Children and Parents through Separation and Divorce*, Macmillan Press (1999)) asserts only that children do better if there is no ongoing conflict between the parents, where contact is free and easy and where contact arrangements offer stability and predictability. A contact order does not ensure stability, reliability, easily implemented arrangements or absence of conflict. Parents who litigate are in conflict and it cannot be assumed that this will dissipate or leave children unscathed once a contact order is put in place and enforced. What is more, contact can, as the Sturge/Glaser report observes, escalate conflict.

[13]It follows, then, that in contested cases, children's welfare cannot straightforwardly be assumed to be best served by ordering contact; it is relevant to consider the reasons for the conflict as well as the impact it is having on the child and on the child's carer. The reasons behind a resident parent or a child's resistance to contact should be taken seriously.

The child

[14]It is necessary to take cognisance of the wishes and feelings of the child. Children of sufficient age and understanding should be listened to. According to the experts' report, children who resist contact for reasons such as the unreliability of the non-resident parent should usually have their wishes respected. Claims that children's resistance is the effect of parental alienation syndrome cannot be entertained because such a 'syndrome' is not recognised as a mental disorder and is not recognised by mental health professionals. And

while there are some resident parents, whether they be mothers or fathers, whose hostility to contact is rooted in their own feelings of anger and rejection, there are also many other reasons for opposing contact. The mother's hostility is not necessarily groundless. Nor is a child's resistance necessarily the result of the mother's malign influence.

The resident parent

[15]The assumption that a resident mother's objections to contact are without justification is implicit in the term 'implacable hostility' that is often applied to describe a mother's attitude. However, it is now accepted that a resident parent is not necessarily being irrational or vindictive if she opposes contact. In *Re D (Contact: Reasons for Refusal)* [1997] 2 FLR 48 at 53, Hale J (as she then was) sitting in the Court of Appeal said:

> It is important to bear in mind that the label 'implacable hostility' is sometimes imposed by the law reporters and can be misleading. It is … an umbrella term that sometimes is applied to cases not only where there is hostility, but no good reason can be discerned either for the hostility or for the opposition to contact, but also to cases where there are such good reasons. In the former sort of case the court will be very slow indeed to reach the conclusion that contact will be harmful to the child. It may eventually have to reach that conclusion but it will want to be satisfied that there is indeed a serious risk of major emotional harm before doing so. It is rather different in the cases where the judge or the court finds that the mother's fears, not only for herself but also for the child, are genuine and rationally held; as indeed the court did in this case.

In *Re P (Contact: Discretion)* [1998] 2 FLR 696 at 703-4, Wilson J divided the concept of a mother's hostility to contact into three main categories:

> It seems to me that a mother's hostility towards contact can arise in three different situations. The first is where there are no rational grounds for it. In such a case the court will be extremely slow to decline to order contact and will do so only if satisfied that an order in the teeth of the mother's hostility would create a serious risk of emotional harm for the child. The second is where the mother advances grounds for her hostility which the court regards as sufficiently potent to displace the presumption that contact is in the child's interests. In that case the mother's hostility as such becomes largely irrelevant: what are relevant are its underlying grounds, which the court adopts. The third is where the mother advances sound arguments for the displacement of the presumption but where there are also sound arguments which run the other way. In such a situation, so it seems to me, the mother's hostility to contact can of itself be of importance, occasionally of determinative importance, provided, as always, that what is measured is its effect upon the child.

[16]I would adopt this approach, but with two qualifications. I question the justification for either a presumption or an assumption that contact is in the child's best interests in contested cases. In addition, I would stress that a resident mother's irrational but genuine anxieties can be a good reason for denying contact in cases where violence is a factor; as Hale LJ reminds us in 'The View From Court 45' at p5, post-traumatic fears might be genuine but might not be proportionate to the level of threat faced. I would agree with the suggestion made in the Report to the Lord Chancellor at para 3.23 that a mother who has suffered significant domestic violence should not be perceived as groundlessly "implacably hostile" but should rather be seen as within the second or third of the categories proposed by Wilson J in *Re P (Contact: Discretion)*.

[17]More generally, it seems to me that the courts have been failing to examine, or too readily discounting, the reasons underlying some resident parents' resistance to contact. Reasons may range, for example, from fear of abduction, fear of violence, concern that the non-resident parent is using contact to reassert control over the resident parent, concerns about the non-resident parent's poor parenting skills, or concern about the non-resident parent's substance abuse.

[18] Instead of focusing primarily on the 'implacable hostility' of the caretaking parent, usually the mother, it is necessary to pay attention to the contribution or otherwise of the non-resident parent to the welfare of the child in question. I agree with Thorpe LJ that it is more important to preserve an existing relationship than to create one that has not yet come into existence. Yet it is also important to remember that not all established relationships are positive. Consideration must be given to the effects of the non-resident parent's past conduct on the child and on the resident parent. Account must be taken of any effects it might have had on the resident parent's present and future parenting capacity. While courts are becoming more willing to enforce contact orders, as in (*A* v *N (Committal: Refusal of Contact)* [1997] 1 FLR 533, they are arguably, as Hale LJ says, taking insufficient care to get them right in the first place. ('The View from Court 45' at p5).

Assumption or checklist?

[19]I have argued that, to the extent that there is agreement about the advantages of contact, this does not extend to cases where parents are in conflict; it cannot be assumed that contact is in the child's best interests in these situations. A better approach, in my view, is to apply to each individual case the checklist in s1(3) of the Children Act 1989. This enables the court to take into consideration all the circumstances of the case and to engage in a balancing exercise, weighing the advantages and disadvantages of contact in the particular circumstances of the case before it. A similar approach was suggested by Wilson J in the Court of Appeal in the case of *Re M (Minors) (Contact)* 1995 1 FCR 753 at 758:

> I personally find it helpful to cast the principles into the framework of the check-list of considerations set out in s 1(3) Children Act 1989 and to ask whether the fundamental emotional need of every child to have an enduring relationship with both his parents (s 1(3)(b)) is outweighed by the depth of harm which, in the light *inter alia* of his wishes and feelings (s 1(3)(a)), this child would be at risk of suffering (s 1(3)(e)) by virtue of a contact order.

[20]Hale LJ in 'View From Court 45' at p 4 recalls that the use of the checklist did not find favour at the time and there is no doubt that there are resource implications if it is applied in each case. Nevertheless this approach seems to me to be the one most consistent with s1 of the Children Act 1989; there is nothing in the legislation to confine the application of the welfare checklist to cases featuring domestic violence or the other factors mentioned by Thorpe LJ as having the potential to offset the assumption, such as child abuse, substance abuse or mental illness. As Hale LJ (p 4) reminds us, the Act avoids any presumptions about what is best for any particular child. And while the term 'assumption' avoids the precise legal implications of a presumption, it too might have the same effect as that mentioned by Thorpe LJ in relation to presumptions; it can impede the search for a welfare solution.

Contact and domestic violence

[21]When it comes to cases involving domestic violence, however, I propose to adopt a different approach. In contrast to the differing opinions and the qualified support for contact, there does appear to be a consensus in relation to cases involving domestic violence. Professor Mary Hayes is quoted in the Report to the Lord Chancellor as saying that '[j]udicial certainty that contact will virtually always promote a child's welfare sits uneasily with research into the effects of domestic violence on children' (para 3.3.2). I would go further. It strikes me that while there is no substantial evidence to support an assumption that contact is almost always good for children, there is much stronger evidence to support an assumption that in cases of domestic violence, contact is undesirable.

[22]Marianne Hester and Lorriane Radford, who have conducted extensive research on this matter, maintain that contact 'tends not to work in circumstances of domestic violence' (*Domestic Violence and Child Contact Arrangements in England and Denmark*, The Policy Press (1996) p3). It does not work because of the 'men's continuing violence and abuse'. The majority of women they surveyed were assaulted after separation and all these incidents were linked to child contact. Moreover Hester and Radford found that children as well as resident mothers face danger. Men who are violent to their partners are likely to be abusive to their children too, or they may use the child to exacerbate the violence or abuse. Alternatively, children may be harmed in an attempt to protect their mothers and may be damaged by witnessing violence against their mothers (see, for example, Hester and Radford (1996); A Mullender and R Morley (eds) *Children Living with Domestic Violence*, Whiting & Birch (1994)). In such cases, the potential advantages of contact are unlikely to be present and the potential disadvantages and risks multiply and increase in severity. The report by Dr Sturge and Dr Glaser likewise points out that children of violent parents are at risk of direct physical abuse and can also be harmed by witnessing or by being aware of violence. In addition, children's attitudes to violence can be affected and boys, especially, may show signs of anti-social behaviour. Also, children may suffer from post-traumatic symptoms, or they may experience continuing fear and anxiety. The benefits of contact, such as the influence of a role model and a contribution to the child's self-esteem and sense of identity are unlikely to be discernible in such cases.

[23]The research also suggests that the impact of abuse on the resident parent can affect children. As Butler-Sloss P says, we cannot dismiss domestic violence as affecting only the adults concerned. Drawing on the experts' report she notes in her judgment that violence to a partner involves a significant failure in parenting. Indeed, Drs Sturge and Glaser cite research indicating that 'threats to the carer on whom the child is dependent have more serious consequences in young children than attacks on themselves'. They point out that domestic violence entails a failure to protect the carer and the child. This, they say, qualifies as child abuse.

[24]There appears, then, to be general agreement among researchers in the field about the negative effects on children and their caretaking parents (usually mothers) of domestic violence and it is on this basis that I consider it appropriate to speak of an assumption. I agree with the experts that there should be an assumption that direct contact is not in the child's best interests in cases of domestic violence. The violent non-resident parent should bear the burden of adducing evidence to persuade the court, in the context of s 1(3) of the Children Act 1989, that contact would be in the child's best interests. It would then be open to the court to order contact if satisfied that, for example, the violent incident was a minor and isolated one, or that the perpetrator has addressed his behaviour.

[25]Section 1(d) of the Family Law Act 1996, while of uncertain application given the non-implementation of other parts of the Act, demonstrates Parliament's concern to protect vulnerable family members from harm. It provides that 'any risk to one of the parties to a marriage, and to any children, of violence from the other party should, so far as reasonably practicable, be removed or diminished'. An assumption that contact is not in the child's best interests would be consistent with this provision; the applicant would bear the responsibility of showing that the risks have been removed. Such an assumption would be no more inconsistent with the provisions of the Children Act 1989 than the presumption in favour of contact hitherto operated by the courts or the assumption now advocated by Thorpe LJ. Indeed, given the child welfare evidence against contact where there is domestic violence, it is

likely that applying the assumption I am advocating will advance rather than impede the search for a welfare solution. Furthermore, unlike Thorpe LJ, I do not think the approach I am putting forward would lead to an excessive emphasis on physical abuse or past behaviour. Firstly, as long as domestic violence is understood in its wide sense, courts should be able to extend their inquiries to abuse other than physical abuse. Second, past abuse should be considered. Hester and Radford (1996 p 7) have found that abusers often continue to abuse post-separation so that past conduct is relevant to a determination of the child's future welfare. Further, depending on the research available, it may well be appropriate to apply the assumption that contact is not in a child's best interest in relation to some of the other factors identified by Thorpe LJ such as child abuse, including emotional abuse.

[26]While no court has ever explicitly articulated an assumption against contact, there is implicit support for it. In *Re H (Contact: Domestic Violence)* [1998] 2 FLR 42 at 57, Wall J made it clear that it was up to the father concerned to demonstrate that he had changed:

> The father must also demonstrate that he has the capacity to behave appropriately with the children; that he recognises the corrosive effect of his constant denigration of the children's mother, that he recognises the real basis of her justified fears of him; that he can show that he is not a threat to the children or the mother; that he will not seek to undermine the children's affection for their mother and their placement with her; and that he can demonstrate a consistency of commitment to them.

Similarly, he said in *Re M (Contact: Violent Parent)* [1999] 2 FLR 321 at 333:

> Often in these cases where domestic violence has been found, too little weight…is given to the need for the father to change…a father, like this father, must demonstrate that he is a fit person to exercise contact; that he is not going to destabilise the family, that he is not going to upset the children and harm them emotionally.

And in *Re K (Contact: Mother's Anxiety)* [1999] 2 FLR 703 at 716, Wall J instructed the father that if he wished to reapply for direct contact, 'to come armed with either a psychiatric or psychological report' showing that he had begun to understand the effects of his violence.

[27]I respectfully disagree with Butler-Sloss P when she suggests that it is enough that the perpetrator makes a genuine effort to change. To discharge the burden upon him, the violent parent should have to produce evidence that there has been actual change. Good intentions are no guarantee, and provide scant evidence, that the victims of abuse will be safe if exposed again to the abuser. According to Russell Dobash and Rebecca Emerson Dobash, it is common for perpetrators of domestic violence to make promises to change in order to persuade their partners to relent. Often contrition is designed to induce the abused partner to return or, in cases where contact is in issue, to get the abused partner to allow them to see the children (in *Women. Violence and Social Change* (1992) Routledge pp230ff)

[28]I concur with the recommendation made by Drs Sturge and Glaser that, to persuade the court that contact should be granted, the parent seeking it should have to acknowledge responsibility for the violence and exhibit understanding of its effects. There would also need to be evidence of abstention from violence. The court would need to be satisfied that the parent is committed to the well-being of the child and that he is not seeking contact in order to track down the resident parent and/or to use contact to perpetuate an oppressive relationship with that parent. The court would have to consider whether the perpetrator's behaviour has improved, and, irrespective of this, whether the resident parent and/or the child is/are so badly affected by past violence and the fear evoked by the perpetrator that contact would be harmful to the child.

Proof of violence

[29]I have said that the assumption should arise in cases of domestic violence. This raises two questions. First, how ought we to define violence? Too narrow a definition would leave too many women and children exposed to intimidation and to harm. I would therefore endorse the approach taken by the Law Commission in No 207, *Family Law, Domestic Violence and Occupation of the Family Home* HMSO, 1992 para 2.3. Domestic violence is defined more widely than physical abuse. It includes 'any form of physical, sexual or psychological molestation or harassment which has a serious detrimental effect on the health and well-being of the victim'. Examples of molestation or harassment include behaviour other than physical abuse such as intimidation. Research suggests that domestic violence often takes the form of a 'pattern of ongoing, systematic and escalating abuse' (E Stark and A Flitcraft *Women at Risk. Domestic Violence and Women's Health*, Sage (1996) p. 3) and this observation may assist in enabling courts to distinguish between the trivial cases Thorpe LJ mentions and cases where there is harmful behaviour. Stark and Flitcraft's work also alerts us to the fact that although a particular act taken in isolation does not appear significant, it may be part of an ongoing pattern. In any event, the question for the court is whether it is in the child's best interests to have contact with the non-resident parent. Even if a court classifies a single, isolated minor slap as violence, this is unlikely to prejudice the non-resident parent unduly; he would probably succeed in offsetting the assumption that contact is contrary to his child's best interests. If the minor slap is part of a pattern of abuse, he ought to have more difficulty in doing so.

[30]The second question is: what evidence of violence suffices to support an allegation? The fact that there is no independent evidence of past violence such as, for instance, reports to the police, does not necessarily mean that contact is safe for the resident parent and the child. It is well known that domestic violence is underreported. Only a small proportion of victims notify the police or seek court orders. And they tend to do so only after enduring multiple attacks, threats and incidents of intimidation. For example, Catriona Mirrlees-Black, in a recent report, *Domestic Violence: Findings From a New British Crime Survey Self-Completion Questionnaire* Home Office Research Study 191 (1999), p54, states that only 36% of even chronic victims alerted the police to their situation.

[31]Butler-Sloss P remarks in her judgment that allegations of domestic violence may be untrue or grossly exaggerated. I agree with her that it is necessary to scrutinise the evidence carefully but the court should, in my view, be slow to adopt an overly sceptical attitude when doing so; there is no research that bears out the popular belief that women commonly exaggerate or make false allegations of violence. Indeed, according to Hester and Radford, women's accounts of violence failed to surface or tended to disappear in the course of contact negotiations (1996 p6). Courts should also be aware that the fact that the parties have separated does not necessarily mean that the violence has stopped.

[32]Butler-Sloss P indicates in her judgment that the court need to consider domestic violence where this has been proved as in cases of other 'proved harm or risk of harm to the child'. I would like to stress that, in my view, proof of risk ought to suffice. Section 1(3)(e) of the Children Act 1989 refers to the need to consider any harm that the child has suffered or is at risk of suffering. It should similarly suffice to show threats of violence or a risk of violence to the child or resident parent. This would reflect the realities of domestic violence and would offer protection to more victims.

[33]An approach analogous to that used to determine significant harm or the risk of significant harm in terms of s31 of the Children Act 1989 should be the starting point. The Children Act requires proof of significant harm or the likelihood of significant harm. The question of when this threshold has been crossed was addressed by the House of Lords in *Re H and Others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563. Lord Nicholls, delivering the opinion of the majority, concluded that the word 'likely' refers to a 'real possibility, a possibility that cannot be sensibly ignored having regard to the nature and gravity of the feared harm in the particular case' (p.585). This formulation is apt for assessing whether there is a risk of harm if a contact order is made in a case involving allegations of domestic violence. The risk must be proved on a balance of probabilities. However, as Lord Nicholls pointed out in *Re H*, it is open to a court to make a finding that there is a real possibility of future harm although harm in the past has not been established (at p591). Where there is evidence of a combination of worrying factors affecting the care of the child, a court is justified in finding that, although there is no evidence of past abuse, there is a real likelihood that harm will occur in the future (p 591) The same reasoning would apply if there is evidence of worrying features relating to the treatment of the resident parent by the non-resident parent; the child, or the resident parent or both could be at risk. And in assessing the risk of future violence, the court needs to keep in mind the research showing that violence often escalates and in some cases only begins after separation. What could be seen as relatively minor incidents could be precursors to far more severe harassment or even physical attacks.

[34]While the Children Act requires us to make our decisions on the basis only of the best interests of the child, courts should be mindful of the dangers of allowing contact orders in circumstances where to do so would be oppressive to caretaking mothers. To do so is to risk adverse effects on the mother's ability to care for the child, to risk damaging the relationship between the child and the primary caretaker and to risk destabilising the child's home life. In addition, as the experts' report says, children may well be aware of the fear that the violent parent arouses in the resident parent.

Counselling and Mediation

[35]Thorpe LJ has eloquently expressed the problems contact cases pose for the courts and the legal system. I will add only a brief comment of my own. Courts and, for that matter CAFCASS, cannot address family dysfunction and change behaviour. Many families or individual family members embroiled in contact disputes would benefit from therapeutic intervention. However counselling or mediation should not, in my opinion, be presented to victims of domestic violence as obstacles to be overcome in order to reach the courts. There are cases, particularly where domestic violence is involved, where it is the perpetrator, not the victim, who needs to change and where such change is unlikely. These are also cases where allowing a victim to be potentially subjected to pressure to come to an agreement would not result in safe, beneficial contact arrangements. Victims need to be screened by mediation services in order to identify cases of domestic violence before mediation commences. Where domestic violence is identified, there should be a presumption against mediation.

Supervised Contact

[36]Supervised contact is often seen as the solution to the problem of maintaining contact with violent or potentially violent parents. It is assumed to provide safety. It is also assumed that it will lead to a situation where unsupervised contact becomes possible. However it is apparent from the experts' report that supervised contact is no panacea. Safety from physical and emotional abuse requires a 'high level of constant supervision' and not all contact centres

provide this. In addition, they say, supervised contact is artificial and often disliked by the child. These problems should not be easily dismissed on the assumption that supervised contact is a temporary measure which will be replaced by more beneficial unsupervised contact. Supervised contact is, the experts say, unlikely to improve parenting skills or to make it safe for the child to see the parent alone. It should therefore only be used where change over the short term is likely.

Indirect Contact

[37]Drs Sturge and Glaser set out the benefits and risks of indirect contact in their report. Indirect contact can provide the child with an awareness of the non-resident parent's interest and concern. It can enable the child to gain information about the parent and to keep open the possibility of a relationship at a later date. However it can impose stress on the resident parent and the child. It has the potential also to enable an abusive parent to continue inflicting emotional abuse. There is also the risk that it could be used to discover the whereabouts of the child and mother. For these reasons, I would go further than the experts' recommendations and apply the assumption against contact in relation to indirect contact as well as direct contact in cases of domestic violence. The evidence required to persuade the court of the benefits and safety of indirect contact would be different, and it would probably be easier to convince the court, but it should still be the task of the non-resident parent to adduce it.

The Appeals

[38]The facts of all these cases are set out in some detail in the judgment of Butler-Sloss P and will be only briefly adverted to here.

Appeal in Re L

[39]This case involves a child who is not yet two years of age and who has had no relationship with the father. The father has subjected the mother to sadistic violence and intimidation, and attacked her even while she was feeding the child. He has never shown any sense of remorse or acknowledged the effects of his behaviour. The court below came to the conclusion that contact would cause the mother great anxiety and that her attitude to contact would put the child at risk of significant emotional harm.

[40]This seems to me to be a classic example of a father who should be denied direct contact unless he can convince the court that contact would be in the child's best interests. He has offered no evidence to that effect. This case falls squarely within the set of circumstances contraindicating direct contact which the experts outlined in their report:

> In the event that there is no meaningful relationship between the child and the non-residential parent and an established history of domestic violence with or without opposition to contact by the resident parent, there would need to be very good reason to embark on a plan of introducing direct contact and building up a relationship when the main evidence is of a non-residential parent's capacity for violence within relationships.

[41]The only factor put forward by his counsel that makes some form of contact desirable is that the father is black and the child is mixed race. Some knowledge of her roots might contribute to her sense of identity. In some cases there may be other people in a child's life who can serve this purpose but we are told in this case that the father's input is necessary.

[42]As the experts' report tells us, in every case the purpose of contact must be considered before deciding whether it should be ordered and, if so, what form it should take. Certainly it is possible to achieve the purpose set out in the father's argument by means of indirect

contact. The judge was right to order this and the family assistance order he made may be of some help in setting it up. It is to be hoped that the use of a family assistance order will make it possible for the mother to be protected as much as possible from the dangers that indirect contact can present. Drs Sturge and Glaser suggest that vetted letters instead of telephone calls may help to avoid the potential for intimidation and undermining of the resident parent and this might be the preferred option. Hopefully, while the family assistance order is in place, it need not be the mother who has to read and vet any letters if she does not want to do so. Thereafter, if the letters contain material that is threatening or intimidatory, the mother would in my view be justified in seeking to terminate contact completely.

[43]The father also appeals against the dismissal of his application for parental responsibility. The general principles set out in *Re H (Minors)(Local Authority: Parental Rights) (No 3)* [1991] Fam 151 sub nom *Re H (Illegitimate Children: Father Parental Rights) (No 2)* [1991] 1 FLR 214 apply. The court must take into account a number of factors and, in particular:

(1) the degree of commitment which the father has shown towards the child
(2) the degree of attachment which exists between the father and the child
(3) the reasons of the father for applying for the order.

The courts in the past have interpreted these criteria in a way that suggests that very little has been expected of fathers. For instance in *Re S (Parental Responsibility*) [1995] 2 FLR 648 at 659, the court was of the opinion that the mere fact that a father has applied for an order should be taken as evidence of his commitment. In my view, that is tenuous evidence of commitment. In any event, in this case, the judge found that the father's motive for applying was not concern for his child but his wish to control and subdue the mother. The judge was correct to refuse parental responsibility.

[44]The judge did say that he might reconsider at a later stage in the light of the father's commitment to indirect contact, his response to the judgment and any acknowledgement of his violence and its effect on the mother. I would caution against reconsidering too quickly or too readily. I would expect the father to provide evidence that he has changed before I place the burden on the mother of dealing with him in important matters.

Appeal in Re V
[45]The child, a boy now aged 9, last saw his father when he was 4. Contact ceased after the father attacked the mother with a knife. He was convicted of causing grievous bodily harm and jailed. He has since undergone counselling in anger management. Anger management is not always the solution to domestic violence which is often motivated by a wish to control the victim rather than being an uncontrolled outburst of rage. Nevertheless in this case it appears to have had some effect, with a report by a Dr Brenner to the court below recording that there has been a 'big change'. There has been indirect contact in terms of a court order and it is against that order that the father appeals. It might be questioned whether indirect contact is proving in any way beneficial to the child; the future potential benefits are at best speculative. Nevertheless that order is not in dispute before the court; the mother does not appeal against it.

[46]A change in behaviour is evidence that could go some way to displacing an assumption against direct contact in such a case. Neverthelesss, while the mother and step-father would support contact, the boy steadfastly refuses to talk about his father and does not wish to have contact with him. He has shown no interest in the letters the father has written to him.

[47]As Butler-Sloss P says in her judgment, the experts' report urges courts to take children's wishes seriously. The report also notes that children may be traumatised even after being removed from a violent situation. This child showed great distress and began bed-wetting during the course of these proceedings. The judge decided to leave it up to the mother and step-father to encourage contact when they think it appropriate to do so. I agree with the President who observes that this decision was made with the best interests of the child at the forefront of the judge's mind; contact cannot be seen as a reward for reformed conduct on the part of a parent. I agree that there is no reason to interfere with the exercise of the judge's discretion.

[48]The mother attempted to adduce additional evidence. This is not under consideration at present as it is possible to make a decision without it. However it may be relevant, as Butler-Sloss P says, to any future application the father may make. The first point sought to be made is that the mother's mental state is more fragile than originally thought in the earlier proceedings. The second is that the father made very few attempts to communicate with his son; the uptake of the indirect contact was very limited. If there is a further application, the court will have to investigate the reasons for this. It must be kept in mind that unreliable contact, according to the experts' report, can have a severely deleterious impact on children; children can feel let down, disappointed and rejected if a parent is attentive only sporadically. While the experts were here talking about direct contact, their analysis can be extrapolated to indirect contact. The father's limited interest in indirect contact will make it necessary to ask whether he is sufficiently committed to his child, whether he has the capacity to meet the child's needs and whether his motives for applying for direct contact may not relate to the welfare of the boy.

Appeal in Re M
[49]This was a case where there had been violence in the past on the part of the father. Since then, there have been 5 years of contact at a contact centre supervised by the mother. This ended when the parents had a row in front of the child, G. He has since refused to see the father and is now aged 9. The father applied for direct contact but the judge refused, ordering indirect contact. It is against that order that the father appeals.

[50]The evidence does not disclose any violence or frightening conduct on the part of the father during the periods of supervised contact, although we do know that there was a final confrontation between the parents. The domestic violence in the past has left its mark on the mother but this does not appear to be her main reason for opposing direct contact. Her reason was that she did not want to put pressure on G and force him to have contact. This would be appear to be a case where subsequent events have had the effect of displacing the assumption against contact and the case should be decided, as the judge did decide it, by the application of the s1(3) checklist. I would agree that indirect contact is appropriate.

[51]The father alleged that G suffered emotional harm as a result of the cessation of contact and that this is a case of parental alienation syndrome. The judge, for the reasons explained by Butler-Sloss P, rightly rejected both submissions. There is no such generally recognised syndrome and to subject a child of 8 to therapy when there is no evidence, as the judge pointed out, that he needs it, would be unacceptable. The mere fact of his resistance to contact is not evidence of any abnormality.

[52]Butler-Sloss P has remarked that although there is no recognised syndrome, there are parents who alienate their children from the other parents without good reason. I would like to add a comment to that observation. It should not be assumed that this aleination is common and the court should always scrutinise the resident parent's reasons carefully and take them seriously. Nor should it be assumed that it is primarily mothers who are the culprits. There are fathers who use contact to seek to undermine the relationship between mother and child. I, like the judge in this case, would be reluctant to rebuke mothers for failing to show enthusiasm for contact when they have suffered abuse at the hands of fathers who apply for it; it seems unreasonable to expect them to actively facilitate and encourage contact. It should perhaps suffice that they do not obstruct it where it is in their children's best interests that it should take place.

Appeal in Re H

[53]This concerns two children. The father is a practising Muslim and lives in Germany. During the marriage, he subjected the mother to violence in response to her refusal to conform to the precepts of the Muslim religion. In particular, the court below found that the father had threatened to kill the mother, that she is very frightened of him and also fears, on reasonable grounds, abduction of the children. The father has not seen the children for more than three years and has applied for defined contact. There is a residence order in favour of the mother. She and the children lead westernised lives.

[54]While the children were removed from the father without permission, he did not attempt to institute abduction proceedings. And while it is true that, in consequence of the mother's actions, the children have been brought up outside the Islamic faith, I disagree with Thorpe LJ who appears to criticise her for making the choices she has and so, he says, impoverishing her children. It cannot be right, if this is what he means, to suggest that a mother as primary caretaker of a child might be expected to forego life choices such as religious affiliation to conform with the non-resident parent's convictions. Furthermore, it cannot, in my view, be relevant that she was raised in and married into her husband's religion; this surely cannot deprive her of the right to choose to abandon that religion. She might be expected to make her children aware in a general way of their heritage but, in such cases, the parent with contact is normally the children's link to that aspect of their background. In normal circumstances it would have been open to the father to see his children and to inculcate in them some knowledge of his religion and culture. The reason that he does not have the opportunity to see them is that he subjected the mother to the extreme threats and intimidation that led her to flee with the children, coupled with his refusal to recognise the mother's new lifestyle.

[55]All the evidence indicates that the father expects the children to be brought up as Muslims. I agree with Butler-Sloss P that the father will seek to assert his cultural and religious influence over the children and so undermine the stability of their lives with their mother. This concern is heightened in the context of the threats and intimidation to which he subjected the mother in the past. I do not share the view of Thorpe LJ that that the fact that there was little actual violence might have warranted a less restrictive order. I would not lightly dismiss conduct that induces high levels of fear in the mother merely because the level of physical violence is not severe. The trial judge's decision to deny direct contact is in my view justified. However, although there should be indirect contact which might serve to maintain the children's awareness of their Muslim heritage, this ought to be confined to letters and cards. As the expert report warns, it is possible to use indirect contact to undermine the resident parent and to issue threats.