Contact and Domestic Violence: ***Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence)***

[2000] 2 FLR 334

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Introduction

In the course of the past few decades we have seen growing recognition by academics, policy-makers, legislators and the judiciary of the risks posed to women by domestic violence. We have also witnessed burgeoning concern about child abuse. At the same time, there has been widespread consternation about 'breakdown of the family' leading to concerted efforts to maintain the 'separated but continuing' or 'binuclear'[1] family after divorce or separation. Yet it is only relatively recently that the potential contradictions between the perceived need to preserve family ties and the need to protect vulnerable family members have emerged in legal discourse. This has occurred as a result of a growing body of social science knowledge about domestic violence. In particular, research suggests that violence continues and even escalates after separation and that child abuse is associated with woman abuse.[2] These links drawn by researchers have impacted on both professional and judicial approaches to contact disputes

[1]See Day Sclater and Piper, 'The Family Law Act 1996 in Context in Day Sclater and Piper (eds), *Undercurrents of Divorce* p.11 (Ashgate, 1999).

[2]See, for discussion Kaganas and Day Sclater, 'Contact and Domestic Violence - The Winds of Change?' [2000] Fam Law (forthcoming).

involving allegations of domestic violence. In addition, a consultation document has been published canvassing opinion on how to deal with such cases,[3] and a report has followed recommending the implementation of guidelines.[4] The recent decision of the Court of Appeal in *Re L*[5] follows the lead set by that report as well as that set by a small number of judges in the Family Division of the High Court: it reins back, in domestic violence cases, what was a very strong trend to prioritise contact between children and non-resident parents while downgrading the risks to which such contact might expose mothers and children.[6]

Since Wrangham J stated in *M* v *M (Child: Access)*[7] that contact is a 'basic right in the child', the courts have operated what has been termed a 'very strong presumption in favour of maintaining contact between the child and both parents'.[8] This presumption was clearly articulated in *Re H (Minors)(Access):*[9]

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[3]Advisory Board on Family Law: Children Act Sub-Committee *Consultation Paper on Contact Between Children and Violent Parents* (The Stationery Office, 1999)

[4]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* (The Stationery Office, 2000)

[5]*Re L (Contact:Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence)* [2000] 2 FLR 334

[6]See Kaganas, 'Contact, Conflict and Risk' in *Undercurrents of Divorce*, n1.

[7][1973] 2 All ER 81, at p.85

[8]*Re M (Contact: Welfare Test)* [1995] 1 FLR 274, at p.281.

[9][1992] 1 FLR 148, at p.152. See also *Re F (Minors) (Denial of Contact)* [1993] 2 FLR 677, at p.684.

> Instead of asking ... whether any positive advantages were to be gained by the resumption of access, the test to be applied was whether there were any cogent reasons why the children should be denied the opportunity of access to their natural father.

Where potentially cogent reasons were advanced, such as sexual abuse of the child, courts would sometimes order supervised contact.[10] The fact that supervision, even at contact centres, did not necessarily offer protection to abused children or mothers did not deter courts from resorting to it. Supervised contact was also used in cases where the prospects of future unsupervised contact looked bleak and supervision appeared set to continue for extended periods.[11] Opposition to contact by mothers and by children cut little ice with the courts.[12] Any distress manifested by children at the prospect of contact was generally regarded as minor and transient, easily outweighed by the perceived long-term benefits of contact.[13] Often, children's views were attributed to the malign influence of unreasonable mothers. Mothers who opposed contact were frequently dubbed 'implacably hostile' and chastised. Some were penalised by the courts.[14]

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[10]See *L* v *L (Child Abuse: Access)* [1989] 2 FLR 16

[11]See *Re M (Contact: Supervision)* [1998] 1 FLR 727; *Re P (Contact: Supervision)* [1996] 2 FLR 314..

[12]See, on the courts' attitude to children's opposition, Fortin, *Children's Rights and the Developing Law* (Butterworths, 1998) at pp.217-9.

[13]See *Re H (Minors) (Access)* [1992] 1 FLR 148; *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124.

[14]See, for example, *A* v *N (Committal: Refusal of Contact)* [1997] 1 FLR 533. See further Kaganas and Day Sclater, op cit. n.2.

An attempt by Wilson J in *Re M (Contact: Welfare Test)*[15] to introduce the checklist contained in s1(3) of the Children Act 1989 into the process of determining contact disputes did not find favour with the courts[16] and was superseded by a strong reiteration of the presumption by the Court of Appeal. In *Re O (Contact: Imposition of Conditions)*[17] the court declared that contact is 'almost always' in the interests of the child.

A softening in judicial attitudes first became apparent in the judgment of Hale J in *Re D (Contact: Reasons for Refusal).*[18] There the judge, accepting that the father posed a risk to the child, whether directly or indirectly through the mother, pointed out that the term 'implacable hostility' was sometimes incorrectly used to refer to mothers whose fears were 'genuine and rationally held'. Subsequent decisions, notably those of Wall J. in the Family Division, established that mothers should not be branded implacably hostile where they resisted contact because they feared non-resident fathers' aggression.[19] And Wilson J in *Re P (Contact: Discretion)*[20] took the view that even irrational hostility on the part of a mother might lead to denial of contact if her attitude would create a serious risk of emotional harm to the child.

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[15]Op cit, n.8.

[16]See Hale, 'The view from court 45' [1999] CFLQ 377, at p.381.

[17]Op cit, n.13 at p.128.

[18][1997] 2 FLR 48 at p.53.

[19]See, for example, *Re K (Contact: Mother's Anxiety)* [1999] 2 FLR 703.

[20][1998] 2 FLR 696

As the courts grew more understanding of mothers' fears, so too they became more critical of violent fathers.[21] Wall J. in particular commented on the need for such men to change and to demonstrate to the court that they are fit to exercise contact.[22] In *G* v *F* (*Contact: Allegations of Violence)*[23] he went further, appearing to suggest that courts faced with allegations of violence should not make contact orders without investigating those allegations and making findings of fact. He emphasised the need to use the s1(3) checklist and so appeared, in effect, to render the presumption inoperative in cases of violence.

This note seeks to examine the extent to which the decision in *Re L* builds upon these earlier cases and to examine the way in which it incorporates the knowledge offered by child welfare science into the law.

The Appeals

The judges were considering four cases of appeal against a refusal to order direct contact in favour of fathers. The main judgment was delivered by the President of the Family Division, Butler-Sloss P. The first appeal, Re L, was by a father who was found to have perpetrated what

[21]See Kaganas and Day Sclater, op cit, n2.

[22]*Re M (Contact: Violent Parent)* [1999] 2 FLR 321, at p.333; *Re H (Contact: Domestic Violence)* [1998] 2 FLR 42, at p.57; *Re K (Contact: Mother's Anxiety)*, op cit n.19 at p.716. See further Kaganas and Day Sclater, op cit. n2.

[23][1999] Fam Law 809

the court below called 'a catalogue of sadistic violence'.[24] The risks to the child, and the failure of the father to face up to them and so, said the court, to reduce them, meant that the appeal had to be dismissed. Indirect contact would suffice to enable the child, who was of mixed race, to understand her roots and to establish her identity.[25]

In the second case, Re V, there had been a history of violence but the father had addressed his conduct by undergoing counselling with an expert in anger management and, on the basis of expert evidence, it was accepted that he had changed. However, the child, aged 9, who had witnessed a serious incident five years previously, refused to see his father. The, court referring to a psychiatric report before it, the Sturge/Glaser report,[26] noted that even where children do not continue in a violent situation, the trauma may persist. It took the view that the court below was correct in refusing an order for direct contact. Such an order would not be in the child's interests as the prospect of seeing the father caused him considerable distress. The court went on to note that at some future stage, if the case came back to court, it might be necessary to take into account the father's limited take up of opportunities for indirect contact and the mother's fragile

[24]Op cit, n.5 at p.**page no to be added**

[25] The Court of Appeal briefly considered a claim that the refusal of direct contact constituted a contravention of Arts 8 and 14 of the European Convention on Human Rights. It held that the father's right to family life had to yield to the child's interests under art 8(2); there was a real risk of emotional harm to the child and the court was obliged to protect her. This approach is consistent with other recent decisions to the effect that the application of the welfare principle is consistent with the Convention. See, for example, *Re KD (A Minor) (Ward: Termination of Access)* [1998] 1 All ER 577; *Dawson* v *Wearmouth* [1999] 1 FLR 1167, at p.1182. This issue is not pursued here as it is not directly relevant to the concerns of this note.

[26]Sturge and Glaser 'Contact and Domestic Violence - The Experts' Court Report' [2000] Fam Law (forthcoming). See further below.

emotional state.

The third appeal, Re M, concerned a violent father of a 9 year old boy who, for a number of years, had seen his son at a contact centre. The contact ended when there was an argument between the parents, after which the boy refused to see his father. At the time of the hearing, there had been no direct contact for two years and the mother said she felt unable to put pressure on the child or to force him to see his father. A forensic psychologist testitifed that this was an instance of 'parental alienation syndrome'; the child had been alienated from his father by his mother and should undergo therapy. However the court below accepted that the mother, although unenthusiastic, was not hostile and had not consciously or directly sought to persuade her son to reject contact; she had after all kept up the contact at the contact centre for 5 years. The Court of Appeal remarked that:

> There is, of course, no doubt that some parents, particularly mothers, are responsible for alienating their children from their fathers without good reason and thereby creating this sometimes insoluble problem.[27]

However, this was a 'long way from a recognised syndrome requiring mental health professionals to play an expert role'.[28] Relying on the Sturge/Glaser report, the Court of Appeal noted that parental alienation syndrome is not a recognised disorder. It accepted the finding of the court

[27]Op cit, n.5 at p.**page no to be added**

[28]Ibid, at p.**page no to be added**

below that the child was normal and healthy and endorsed its decision not to order direct contact. To effect contact, it would be necessary to subject the child to therapy. The court was not prepared to make such an order in relation to a boy of his age against the mother's wishes and in the absence of representation of the child's interests by the Official Solicitor. The court considered that if he were forced to see his father, this would have a detrimental effect on him and on his long-term relationship with his father. The Court of Appeal noted that the main source of the mother's objections to contact was not the history of violence but the child's resistance. It went on to speculate that the long period of contact in a contact centre must have lacked stimulus and interest and that the relationship between father and son had not had an opportunity to develop. This, apparently, would explain the child's reluctance because unstimulating experiences were included in the risks of direct contact mentioned in the Sturge/Glaser report. The object of indirect contact would be to build up a better relationship. The mother should, said the court, keep the father informed of his child's progress and, if the child failed to do so, she should respond to his communications.

Finally, in Re H, the court dismissed an appeal by a father who had terrified the mother with threats to kill her if she did not conform to the requirements of the Muslim faith. The mother fled from Germany, where the family had lived, taking the children with her. Since the flight, five years previously, she had raised them in a non-traditional, secular way. The court below found that the mother was justifiably afraid of the father and had reason to fear abduction as well. Even if her fears were not justified, contact would not work without her support and without the father's acceptance of the children's lifestyle. The Court of Appeal also regarded as significant

the threats, the mothers genuine fears, the cultural and religious differences and the father's inability to adapt to the changed circumstances. Although the Court of Appeal criticised the mother for her unauthorised removal of the children from Germany, it refused to order direct contact. The father, it said, would attempt to reassert his Muslim values in a way that would risk undermining the stability of the children. And the Sturge/Glaser report indicated that to undermine children's stability by deliberately or inadvertently setting different moral standards or standards of behaviour would be to risk harming them.[29]

Limiting the operation of the presumption

While the Court of Appeal made the usual disclaimer, stating that each case involving children is unique,[30] the decision in *Re L* does consolidate a trend in domestic violence cases. The court was strongly influenced in its thinking by the Report to the Lord Chancellor's Department.[31] There it was said that there needs to be greater awareness of the effects of domestic violence on children, whether as witnesses to it or as victims of it, and also of the impact of violence on resident parents. Proper arrangements, it said, must be put in place to protect the child and the resident parent from physical and emotional harm. In addition, as is apparent from the description of the appeals above, the court was even more profoundly infuenced by a psychiatric report[32] prepared

[29]Op cit, n.5, at p.**page no to be added**

[30]Ibid at p.**page no to be added**

[31]Op cit, n.4.

[32]Op cit, n.26.

for it by two child psychiatrists, Drs Sturge and Glaser, and incorporating the views of other child psychiatrists. That report persuaded the judges of some of the risks posed by allowing contact.

Referring to both the Sturge/Glaser report and the report to the Lord Chancellors' Department, Butler-Sloss P. observed[33] that judges and magistrates dealing with family cases should be more aware of the existence and consequences of domestic violence. She noted the tendency of the courts in the past not to address allegations of violence in contact disputes because they assumed these were not relevant to deciding issues concerning the children. She also suggested that the general principle applied by the courts that contact is in the child's best interests may have discouraged them from paying sufficient attention to the adverse effects on children of domestic violence. Citing the Sturge/Glaser report, she asserted that violence to a partner involves a significant failure in parenting; it constitutes a failure to protect the child's carer and a failure to protect the child emotionally.

The President went on to set out how courts should approach cases where there are allegations of violence which might affect the outcome. First, these allegations must be adjudicated on. Should the court find that domestic violence has occurred, this does not, in principle, create a bar to contact. Nor, she said, rejecting the recommendation made in the Sturge/Glaser report on this point, does it raise a presumption against contact. The proper approach where domestic violence is a factor could, she said, be found in the judgment of Wilson J in *Re M.*[34] The court should

[33]Op cit, n.5, at pp.**page nos to be added**

[34]Op cit, n.8.

apply the s1(3) checklist and ask whether the child's need for contact is outweighed by the harm a contact order would cause, viewed in the light of the child's wishes and feelings (s1(3)(a)) and any risk to the child (s1(3)(e)). In cases of 'proved domestic violence', the court must engage in a balancing exercise. It must:

> 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.[35]

Lord Justice Thorpe too stressed the checklist but did not single out domestic violence cases as a special category. He indicated that violence should not be allowed to become a primary consideration in contact cases. Proof of violence may 'offset' the general 'assumption'[36] in favour of contact, he said, but it is only one factor among many that might have this effect. Others would be, for example, child abuse (whether physical, sexual or emotional), substance abuse, mental illness, or a desire to obtain contact in order to dominate or threaten the resident parent.

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[35]Op cit, n.5, at p.**page no to be added**

[36]Ibid, at p**page no to be added**

It is the case therefore that, where domestic violence is proved, the presumption or, as Thorpe LJ preferred to call it, the ‘assumption’ in favour of contact does not operate. Instead, the welfare checklist is to be deployed in determining the outcome of the dispute. Moreover, on the basis of Thorpe LJ’s judgment, the factors having this effect are not limited, they include serious misconduct on the part of the non-resident parent and extend to malign motives on his part.

Although this represents a move away from the inflexible stance of the courts in the past, it is not a radical development. In the past, conduct such as child abuse has sometimes had the effect of rebutting the presumption in favour of contact altogether or of leading, more often, to supervised or indirect contact. The outcome of such cases, applying the Butler-Sloss judgment, may well be the same. Even if the presumption is not applied, it is open to courts to order contact, whether direct, supervised or indirect, on the basis that its benefits outweigh any disadvantages. What is significant, however, is the fact that the court is now expected in all such cases, to investigate the allegations and to apply the checklist.

However it is not clear, even in that respect, how far the decision in *Re L* goes. It seems that the range of cases in which the checklist must be applied is limited. On a strict reading of the judgment of Butler-Sloss P., it is only in cases of proved domestic violence that this is required; it is only in relation to cases where ‘domestic violence is a factor’ that she described the test in *Re M* as helpful. The more wide ranging obiter dictum of Thorpe LJ could herald a major incursion into the scope of the ‘assumption’ but, equally, it might be read as being limited to

cases of serious misconduct on the part of the non-resident parent. In any event, in all instances not covered by an exception, it seems, the presumption in favour of contact persists. The courts are not, in such cases, expected to consider all the items enumerated in s1(3). Instead they will continue to work from the basic starting point that contact is best for the child and will make contact orders unless there are strong reasons to the contrary.

Indeed, Butler-Sloss P. made it clear that she endorsed the view expressed by Sir Thomas Bingham in *Re O* that it is 'almost always' in the interests of a child to have contact with the non-resident parent. She also cited with approval his assertion that the courts 'should not at all readily accept that the child's welfare will be injured by direct contact'. And she accepted his injunction that 'intransigent','unreasonable' and 'unco-operative' parents should not be allowed to think they will 'get their own way'.[37] What distinguished the cases before her from *Re O* was that, although the earlier case involved a non-molestation order which had been breached, 'it was not a case of domestic violence'.[38] What distinguished the cases before her from the 'implacable hostility' cases, she said, were the facts that violence or threats of violence had been proved, that the fears of the resident parents were 'reasonable' and that serious issues were raised concerning emotional harm to the children.[39]

This reasoning raises a number of issues. First, it appears that the definition of domestic violence

[37]Op ci, n.5, at p.**page no to be added**

[38]Ibid, at p.**page no to be added**

[39]Ibid, at p.**page no to be added**

implicit in the judgment is a limited one. Second, it appears that, for the presumption/assumption in favour of contact to be rendered inoperative, violence or threats of violence must be proved; risk does not suffice. Third, the judgment might be interpreted to the effect that, to escape being labelled 'implacably hostile', the resident parent must show that her fears are reasonable.

Defining Domestic Violence

The Report to the Lord Chancellors Department[40] reiterated the need, identified in the Consultation Paper[41] for a 'very broad, all-embracing' definition of domestic violence. It adopted the definition set out in the New Zealand Domestic Violence Act 1995, a definition that includes intimidation, harassment, damage to property and psychological abuse.[42] Butler-Sloss P. herself referred in her judgment to the need, expressed in the Report, to protect children and residential parents from emotional harm.[43]Yet, in her efforts to distinguish *Re O*, Butler-Sloss P. might be thought to be excluding from the category of domestic violence the kind of harassment and intimidation that might lie behind a non-molestation order, so ensuring that the presumption continues to be applied in such cases.

In contrast, it appears that Thorpe LJ adopted a very broad definition of domestic violence: 'there is a spectrum within the broad categorisation of domestic violence from the slap that may have

[40]Op cit, n.4, at para 2.1.

[41]Op cit, n.3.

[42] Op cit, n4, at para 2.9.

[43]Op cit, n.5, at p**page no to be added**

been provoked to premeditated murder'.[44] This comment was made in the context of his view that it is necessary to apply the checklist in all such cases, which has the advantage of reducing the scope of the presumption. But its tenor is somewhat worrying. It may be that to define domestic violence so broadly tends to trivialise the phenomenon. Thorpe LJ is correct in his assertion that domestic violence varies in severity. There are undoubtedly instances where one partner, in an isolated incident, responds to what he or she sees as provocation with a slap. These are, as Dobash *et al* say, incidents that are 'unfortunate and regrettable'.[45] Such an event 'does not necessarily constitute a pattern of systematic and sustained violence meant to harm, intimidate, terrorize and brutalize'.[46] However, it it is to be hoped that courts do not assume that it is mothers who have sustained no more than a minor slap who oppose contact. It is also to be hoped that courts are alive to the possibility that a slap may be part of a pattern of intimidation even if the relationship is not necessarily characterised primarily by physical violence. Dobash *et al*, for example, point out that destruction of property can be very frightening and say:

> The overall composite of violence, control, and intimidation may include shouting, pointing and shaking of fists, slamming doors, and destruction of the house or its contents, as well as physical threats against children or pets or the man's threats to take his own life if, for example, the woman leaves him or does not comply with his wishes.[47]

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[44]Ibid, at p**page no to be added**

[45]Dobash, Dobash, Cavanagh and Lewis, *Changing Violent Men* at p.4 (Sage Publications, 2000)

[46]Idem.

[47]Op cit, n.45, at p.17.

Courts faced with mothers who appear recalcitrant should be ready to look carefully at the whole pattern of conduct involved before concluding that their complaints are trivial and that their claims that they are afraid cannot be genuine.

Proven violence or risk?

The second issue raised by the judgment of Butler-Sloss P. is that of the nature of the evidence required to 'offset' the assumption that contact should be ordered. It seems that the court must be satisfied that, as a matter of fact, violence or threats of violence have been established. Only in that event is the court obliged to go on to consider all the circumstances within the framework of the s1(3) checklist contained in the Children Act 1989:

> 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.[48]

On the other hand, in the case of an application for interim contact, where the allegations of domestic violence have 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 is granted or refused. The court should ensure,

> as far as it can, that any risk of harm to the child is minimised [and] the safety of the child and the residential parent is secured before, during and after any such contact.[49]

So, in applications for interim orders, the obligation to assess risk is triggered by allegations of violence and the obligation to protect is triggered by an assessment that there is risk to the child or resident parent. The prinicpal concern in such cases is risk whereas in relation to a full hearing it is proof of violence.

There is, therefore a difference in the way that courts must deal with interim applications and final hearings. Unsurprisingly, the burden on a mother opposing contact and seeking to persuade the court in a full hearing that protection is required is more onerous than that resting on her in interim proceedings. However, it may be that this burden is too heavy. For the assumption in favour of contact to be offset, and for the court to go on to consider s1(3) and the risks to child and resident parent, a factual finding of abuse is required. It seems that it will not suffice, in a full hearing, that there is evidence of a risk of future violence or abuse to the resident parent or child; there must be proof that abuse or threats have already occurred in the past in order for the court to go on to consider future risk. If this reading of the judgment is correct, it may leave some mothers and children vulnerable. It also means that the Court of Appeal has adopted an approach to protection in contact disputes that is even more restrictive than that taken in care proceedings.

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[48]Op cit, n.5, at p**page no to be added**

[49]Ibid, at p**page no to be added**

While a care order may be granted on the basis of risk of future harm in terms of s31of the Children Act 1989, the court in *Re L* appears to require more.There is clearly a difference between the evidence needed to satisfy the court of a fact and that needed to prove risk. In *Re H and R (Child Sexual Abuse: Standard of Proof),*[50] Lord Nicholls distinguished the concepts of existing harm and the risk of harm contained in s31 thus:

> It is ...open to a court to conclude there is a real possibility the child will suffer harm in the future although harm in the past has not been established.There will be cases where, although the alleged mistreatment itself is not proved, the evidence does establish a combination of profoundly worrying features affecting the care of the child.... In such cases it would be open to a court in appropriate circumstances to find that, although not satisfied the child is yet suffering significant harm, *on the basis of such facts as are proved* there is a likelihood that he will do so in future.[51]

Lord Browne-Wilkinson, in his dissenting judgment, was also clear on the point:

> [T]he facts relevant to an assessment of risk...are not the same as the facts relevant to a decision that harm is in fact being suffered. In order to be satisfied that an event has occurred or is occurring the evidence has to show on balance of probabilities that such event has occurred or is occurring. But in order to be satisfied that there is a *risk* of such

[50][1996] 1 FLR 80.

[51]Ibid, at p.101 (emphasis in original).

an occurrence, the ambit of the relevant facts is in my view wider.[52]

The potential consequences for parents involved in care proceedings are far more serious than those attendant on contact proceedings. It is therefore not clear why the Court of Appeal adopted a stricter test and chose to limit the relevance of risk to interim proceedings and to final hearings where abuse has already been proven to have occurred. Of course, it is possible in principle to rebut the presumption, or to displace the assumption in favour of contact, by proving risk to mother or child. Moreover, if domestic violence is broadly interpreted to include emotional abuse, it is likely that in most cases where future risk is involved, there will already be convincing evidence of past abuse at least in the form of intimidation or controlling behaviour. There may also be evidence of past domestic violence in the form of threats. Nevertheless, there seems to be no reason for the court to have adopted a test more restrictive than that contained in s31.

The restrictive test is, however, consistent with a general reluctance to curtail contact. Butler-Sloss P., for example, referred to 'the danger of the pendulum swinging too far against contact where domestic violence has been proved'.[53] This raises the possibility that the balancing exercise which the court is required to undertake under s1(3) might be deployed in a way that continues to accord contact greater weight than other considerations such as the impact on resident mothers of past violence.

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[52]Ibid, at p.82 (emphasis in original).

[53]Op cit, n.5 at p.**page no to be added**

'Reasonable' or 'Genuine' Fear?

Butler-Sloss P. stressed, in distinguishing the appeals before her from cases involving 'implacably hostile', and hence 'bad' mothers,[54] the fact that the resident parents' fears were 'reasonable'.This remark can be read as being descriptive rather than prescriptive since, elsewhere in her judgment, she refers to 'genuine' rather than to 'reasonable' fears. If this reading is adopted, future courts will be able to take cognisance of 'genuine' anxieties that are not necessarily 'reasonable', a course that was, arguably, left open by earlier decisions.[55] A criterion of reasonableness would not, it seems, take sufficient account of the experiences of some victims. As Dobash *et al*[56] intimate, cessation of violence will not automatically bring an immediate and permanent end to the woman's fear. Dora Black, a child psychiatrist, points out that an abused woman may, for example, suffer post-traumatic stress, giving rise to fears disproportionate to any actual danger she and her children might be in.[57]

In any event, judicial assessments of the impact on mothers of past violence are by no means straightforward. Much depends on judicial understandings of the dynamics of domestic violence

[54]See Kaganas and Day Sclater, op cit, n.2.

[55]*Re P (Contact: Discretion)* [1998] 2 FLR 696; *Re K (Contact: Mother's Anxiety)* op cit, n.22. See, for discussion, Kaganas and Day-Sclater, op cit n.2.

[56]Op cit, n.45, at p.23.

[57]Cited in Hale, op cit, n.16 at p.382.

and on awareness of post-separation violence. Much depends on the courts' assessment of the seriousness of the violence concerned and on whether they give sufficient weight to emotional as well as physical and sexual abuse. Much also depends on whether they see any retaliation or act of self-defence on the part of the woman as turning abuse into mutual combat between equals.

It is important, for the protection of vulnerable mothers, that courts take into account factors such as the greater likelihood that women in violent relationships, compared with men, will suffer injuries, including multiple injuries, and that women are more likely to be frightened by violence or threats.[58] Fears are less likely to be perceived as 'genuine' if the parties are seen as equals engaged in a fight. Fears are also less likely to be seen as 'genuine' if it is assumed that they cease once the violence has stopped.

Changing Violent Behaviour

The reasonableness and, possibly, genuineness of a non-resident parent's fears will also be judged against the abusive parent's promise to reform. This is a factor designated by the Court of Appeal as important in assessing risk. Thorpe LJ, for example, declared that:

[58]See Mirrlees-Black, *Domestic Violence: Findings form a New British Crime Survey Self-completion Questionnaire. Home Office Research Study 191* (Home Office, 1999). See for a critique of the BCS as underestimating the extent of violence against women, Walby and Myhill 'Reducing Domestic Violence... What Works? Assessing and Managing the Risk of Domestic Violence. Briefing Note' January 2000, London: Home Office.

> There is the ... obvious distinction between past abuse which has been acknowledged and addressed and a continuing risk of future violence if any opportunity is created.[59]

Waller LJ in turn stated that:

> In assessing the relevance of past domestic violence, it is likely to be highly material whether the perpetrator has shown an ability to recognise the wrong he (or less commonly she) has done, and the steps taken to correct the deficiency in the perpetrator's character.[60]

Butler-Sloss P. too adverted to the significance of an abuser's acknowledgement of past conduct and the need to change. He must also, she indicated, make 'genuine efforts'[61] to change. But, it seems, there is no requirement that these efforts be shown to have been successful.

The degree to which it is possible for abusers to change has been to subject of recent academic discussion and disagreement. In particular, the impact of batterers' programmes on perpetrators' behaviour has proved a controversial issue.[62] The research findings that have emerged thus far

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[59]Op cit, n.5, at p.**page no to be added**

[60]Ibid, at p.**page no to be added**

[61]Ibid, at p.**page no to be added**

[62]See, for example, Bright 'The home-made crime wave' *The Observer*, 16 July 2000; Morley and Mullender 'Hype or Hope? The Importation of Pro-Arrest Policies and Batterers' Programmes from North America to Britain as Key Measures for Preventing Violence Against

suggest that married, employed older men are more likely to forswear violence after participating in abuser programmes than younger, unmarried unemployed men.[63] It also suggests that the nature of the programme is significant as is the manner of entry into it. Dobash *et al*[64] state that:

> Unstructured programs targeting general mental health problems such as self-esteem or those narrowly focusing on emotions such as anger appear less likely to bring about sustainable change.

Similarly, Mullender and Burton[65] contend that neither work on anger management nor work on alcohol abuse can be effective in ending domestic violence because neither factor constitutes a sufficient explanation for its occurrence. It is generally accepted, they say, that 'the most appropriate model for working with perpetrators is a broadly cognitive-behavioural approach combined with gender analysis'. They go on to explain that the cognitive-behavioural approach treats domestic violence as learned behaviour that can be unlearned, entails efforts to change men's attitudes and seeks to challenge denial and minimisation. Gender analysis challenges the belief that men are entitled to control the women in their lives.[66] Dobash *et al* found that men

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Women in the Home' (1992) 6 *Int J of Law and the Family* 265.

[63]Dobash *et al* op cit, n.45 at pp.182-3.

[64]Ibid, at p.182.

[65]Mullender and Burton 'Reducing Domestic Violence ... What Works? Perpetrator Programmes. Briefing Note', Jan 2000, London: Home Office

[66]See also Dobash *et al*, op cit, n.45, at p.45, pp.181-182.

who completed programmes based on this model were significantly less likely to commit a subsequent act of violence than those subjected to more traditional criminal sanctions.[67]

Men who successfully complete a programme[68] are more likely, their research suggests, to cease behaving violently in the short term and are more likely to sustain this change for 1 year after intervention.[69] But, of course, as Dobash *et al* observe, whether perpetrators attend and complete the abuser programme is an important determinant of change.[70] They point out that beginning a programme does not necesssarily mean completion:[71]

> Abusers often agree to participate in men's programs for purely instrumental reasons, such as wanting a partner to return home or in an attempt to avoid prosecution, and many drop out as soon as that immediate objective has been achieved.

The drop-out rate is particularly high in relation to voluntary programmes and it is the most dangerous men who tend to fail to complete these programmes.[72] Court mandated attendance coupled with sanctions for non-attendance appears to be a more effective method of recruiting

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[67]Ibid at p.118.

[68]The programmes concerned were court-mandated.

[69]Dobash *et al*, op cit, n.45 at p.181.

[70]Ibid, at p.183.

[71]Ibid, at pp.44-45.

[72]Ibid, at p.45.

and retaining perpetrators on programmes.[73]

While the work done by Dobash *et al* entailed a comparison between abuser programmes and other criminal justice interventions, their observations and findings could be enlightening in the context of contact disputes. Expressions of a wish to change violent behaviour, and even the act of embarking voluntarily on a programme designed to achieve this, need not be impelled by a genuine wish to reform; such actions could simply be motivated by the desire to be allowed contact with children. Once contact is secured, either through persuading a former partner or a court that violence has been renounced, there is a strong chance that the programme will be abandoned.[74] There must, say Dobash *et al*, be mechanisms for getting men into abuser programmes and ensuring that they complete them.[75]

In the context of contact disputes, courts might consider postponing allowing contact until completion of an appropriate programme. The problem is, of course, one of resources, particularly in the light of the current debate about the funding of programmes.[76] And even if it were possible to require violent fathers to attend such programmes, there remains the possibility that they will nevertheless persist with violent behaviour; in the study conducted by Dobash *et al*,

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[73]See the discussion in Dobash *et al*, op cit, n.45 at pp.47ff

[74] Research conducted in the United States cited by Dobash *et al* (op cit, n.45, at p.45) indicates that most voluntary programmes have a drop-out rate of between 40% and 60% in the first 3 months and that as few as 10% of men referred to programmes complete them.

[75]Op cit, n.45 at p.183.

[76]See Bright, op cit, n.62.

33% of men who completed court-mandated programmes committed a violent act within the year after imposition of the requirement to attend. The figure for the other participants in the research was even higher: 70%. While the figures might be different in the context of contact disputes, it is clear that separation does not necessarily promise protection for victims and their children.[77] For example, according to Mullender,[78] two-thirds of refuges report women being abused and one- third report children being abused during contact visits and during handover of children.[79]

It is to be hoped that the courts, in implementing the guidelines laid down in *Re L*, will be mindful of the difficulties involved in altering physically violent and emotionally abusive behaviour and that they test promises of reform rigorously. The President referred to the judgment of Wall J in *Re M (Contact: Violent Parent)*[80] to the effect that violent fathers might be expected to show a track record of satisfactory behaviour; assertions alone might not be enough. In the light of available research evidence, it appears that mere assertions *should not* be enough; arguably, nothing but a sustained period without any abuse, backed up by an assessment by an

[77]See Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90 *Michigan Law Review* 1.

[78] Mullender 'Reducing Domestic Violence ... What Works? Meeting the Needs of Children. Briefing Note' January 2000, London: Home Office.

[79]See, for more detailed discussion of the incidence of abuse in the context of contact, Hester and Radford *Domestic Violence and Child Contact Arrangements in England and Denmark* (Policy Press, 1996) See also Hester, Pearson and Radford *Domestic Violence: A national survey of court welfare and voluntary sector mediation practice* (Policy Press, 1997); Anderson *Contact Between Children and Violent Fathers: In Whose Best Interests* (ROW 1997)

[80]Op cit, n.22, at p.333.

expert well versed in domestic violence rather than, say, anger management,[81] should suffice.

The Courts and Child Welfare Knowledge

It is the Court of Appeal's use of expert knowledge that is one of the most striking aspects of the case. Increasingly, courts have relied on expert evidence in children cases in order to determine where a particular child's best interests lie and what the likely prognosis for the future might be.[82] More fundamentally, however, it is child welfare science, with its influence traceable back to the work of Wallerstein and Kelly,[83] that lies at the heart of the assumption that contact is in children's best interests. Although the body of research on child contact is complex and far from uniform in its conclusions,[84] the courts, through a process of selection, reconstruction and simplification of available knowledge,[85] have embraced a construction of child welfare that places contact with the non-resident parent at the centre of children's well-being. This

[81]The father concerned in the second appeal before the court, Re V, had undergone counselling with an expert in anger management and was considered ready to resume contact as, according to that expert, he was much calmer and could control his temper. This would not necessarily, on the basis of Mullender and Burton's view, (op cit, n.65) ensure the safety of amother and child.

[82]See King and Kaganas 'The Risks and Dangers of Experts in Court' in Reece (ed) *Law and Science. Current Legal Issues, Vol 1* (Oxford University Press, 1998).

[83]*Surviving the Breakup: How Children and Parents Cope with Divorce* (Grant McIntyre. 1980)

[84]See Rodgers and Pryor *Divorce and Separation: The Outcomes for Children* (Joseph Rowntree Foundation, 1998).

[85]See King and Piper *How the Law Thinks About Children* (Arena, 1995); Kaganas, op cit, n.6.

construction has enabled the courts to apply a 'clear normative principle'[86] that facilitates decision-making.

In *Re L* the Court of Appeal had before it the Sturge/Glaser report which Butler-Sloss P. described as setting out 'the psychiatric principles of contact between the child and the non-resident parent'.[87] So, unusually, in this case, the court had for its guidance, not a case-specific expert report relating to a particular child, but an authoritative document containing 'principles' that are susceptible of general application.

The report detailed the advantages of contact. These included the strengthening of the child's sense of identity and value, as well as the role modelling a father can provide for the male contribution to parenting. The purposes of contact were specified as the maintenance or recovery of beneficial relationships, the sharing of information and the testing of reality for the child.

The report also documented the disadvantages of having no direct contact such as the loss of the opportunity to know the non-resident parent and his kinship group. Included also on the list were factors such as, where the relationship has been a good one, the loss of continuity and the loss of opportunity for different experiences.

However, the report also set out the risks of direct contact. The most generalised form of risk was

[86]King and Piper, op cit, n.85 at p.51.

[87]Op cit, n.5, at p**page no to be added**

said to lie in the possibility that the non-resident parent might fail to meet the child's developmental needs and might perhaps even undermine the child's development or abuse the child. More specifically the report referred to the risk of escalating conflict and the consequent damage to the child's stability and emotional well-being. There might be abuse, including emotional abuse by denigration of the child or the child's carer. Contact might perpetuate damaging relationships such as those characterised by bullying, fear and emotional blackmail, those where different moral standards or standards of behaviour are set, those where little interest is shown in the child and those where contact is unstimulating. Contact was also thought to be risky where the non-resident parent is unreliable or where the child is required to attend against his or her will so that he or she feels undermined, where there is little prospect for change in difficult arrangements such as those characterised by the implacability of a parent, and where there is stress on the carer and child as a result of ongoing proceedings.[88]

Although Butler-Sloss P. remarked that these were all matters with which family courts are 'all too familiar',[89] few of these considerations have prompted courts in the recent past to refuse contact. Moreover, in the light of the fact that the presumption or 'asssumption' in favour of contact remains intact, save in the circumstances designated by the court, they are unlikely to lead to denial of contact in the future in the absence of factors such as abuse or violence. Although Thorpe LJ described as 'legion' the factors that offset the assumption, it is not clear how far the courts will go in abandoning it and requiring the application of s1(3). Moreover, even

[88]See Butler-Sloss P., op cit, n.5 at p.**page no to be added**

[89]Ibid, at p**page no to be added**

if the checklist is applied, the risks perceived to flow from an absence of contact may, as mentioned above, continue to be prioritised over all but the very serious risks of allowing contact. Indeed Thorpe LJ delivered a ringing endorsement of the 'universal judicial recognition of the importance of contact to a child's development'[90] and indicated that this consensus reduces the distinction between the process of applying a presumption and applying a simple welfare test. And, in spite of the complexity of the report he was relying on, stated that 'there can be no doubt of the secure foundation for the assumption that contact benefits children'. In support of his view, he referred to a statement by Dr Trowell of the Tavistock clinic to the effect that 'for most children', contact enhances their mental health and their development.

The qualifying word 'most', used by Dr Trowell, is accorded no significance. Nor are the qualifying statements made by Dowling and Gorrell-Barnes,[91] cited in the judgment, and referring to the need for absence of conflict and the need for stability and predictability in contact arrangements, accorded any discussion. Few of the risks and disadvantages of contact enumerated in the Sturge/Glaser report are permitted to dim the court's enthusiasm for contact. To that extent, the court in *Re L*, as is the case with all legal decision-makers, was constrained by the demands of law; the court needed 'clear normative principles' in interpreting the complex body of knowledge, even in the form of a simplified report, presented to it.

[90]Ibid, at p**page no to be added**

[91] *Working with Children and Parents through Separation and Divorce* (1999, Macmillan Press).

A Therapeutic Approach

Thorpe LJ was clearly acutely conscious of many of the limitations besetting the legal system in the resolution of contact disputes. He even went so far as to question the role of the family justice system to 'produce good outcomes' [92] in the sphere of disputed personal relationships. His concerns centred on cost as well as the drain on judicial time and on the resources of the system. Dysfunctional families and implacably hostile parents, he indicated, would be better dealt with therapeutically. He referred to the fact that there is no appropriate professional within the system whom the judge can ask to work with the family and to implement arrangements. And he expressed the hope, if it were unrealistic to question the usefulness of the family justice system in the context of contact disputes, that at least the newly created CAFCASS service be given a role in addressing the issues that are not within the remit of the courts.

There are two particularly interesting points that emerge from Thorpe LJ's critique of the role of law. First, he suggested that public funds might be better spent on therapeutic services than on supporting litigation, a suggestion which appears to favour a reduction in legal aid in such cases. Second, his concerns seem to focus more on the difficulties of implementing judicial decisions and of persuading recalcitrant parents of their rightness than on the abilities of the courts to determine where the best interests of children lie:

> [C]ases in which it can be said convincingly that the trial judge was plainly wrong in determining a contact dispute upon the application of the welfare principle must be rare

indeed.[93]

Conclusion

Despite the misgivings of Thorpe LJ, the courts will, as he acknowledged, continue to be faced with intractable contact disputes. These they are compelled to decide on the basis of the welfare of the child, an indeterminate and protean concept. The knowledge base on which they have to draw for these decisions is a complex one and one which, in order to make sense in law, has to be reconstructed and simplified. And it appears that the simplified version adopted by law will continue to incorporate a construction of welfare that prioritises contact above other considerations.

This is not to say that the impetus to order contact that has hitherto driven the courts has not been slowed, at least a little. Thorpe LJ appears to qualify somewhat his endorsement of the 'universal' judicial approbation of contact, suggesting that the assumption that contact should be ordered should be weaker in cases where a relationship with the biological father has not developed and where, instead, a psychological attachment to a social father has.[94] The judgment of Butler-Sloss P. demonstrates greater willingness to examine the purpose of contact and to tailor orders to achieving that purpose. More specifically, the wishes of the child and the distress

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[92]Op cit, n.5, at p**page no to be added**

[93]Ibid, at p**page no to be added**

[94]Ibid, at p**page no to be added**

occasioned to children by contact were accorded greater prominence in *Re L* than in many earlier cases. Disruption to the child and the confusion engendered by conflicting values were also given weight.[95] In addition, some of the shortcomings of long term supervised contact, a solution sometimes adopted as a panacea in difficult cases, were highlighted.

Nevertheless, it is not clear how important these factors might be in the future. They may have far less impact in instances where there are not also proven allegations of violence, abuse or at least destructive motives on the part of the non-resident parent to cast doubt on the value of contact and to activate the checklist. And even if there are such allegations, courts may well decide in many cases that other concerns pale into relative insignificance in the face of a perceived overriding need of the child for contact.

[95] Compare, for example, *Re R (A Minor) (Contact)* [1993] 2 FLR 762.