COMMENTARY on *RE L*

Context

The context for *Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence)* [2000] 2 FLR 334 (*Re L*) was complex: the case brought into focus – and was also precipitated by – several developments in the previous decades. First, as Felicity Kaganas noted in her commentary on the *Re L* case, there had been a 'growing recognition by academics, policy makers, legislators and the judiciary of the risks posed to women by domestic violence'.[1] However, there was also growing evidence that increasing awareness of domestic violence amongst professionals in the family justice system was not automatically leading to a change in practice.[2] Some of the reluctance, particularly amongst mediators and family court welfare officers, appeared to stem from fear of undermining an agreed settlement or of encouraging allegations.[3] Other barriers were that lawyers over-estimated their ability to 'pick up' a client's history of domestic violence.[4] There was, therefore a need for a clear unequivocal judicial line on the importance of screening for, and taking account of, domestic violence.

Secondly, and very importantly in the context of the family courts and contact cases, where the welfare of the child must be the court's paramount consideration, the last two decades of the 20th century had also witnessed widespread concern about

[1] Kaganas, F. *'Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence)* [2000] CFLQ 311. The policy concern was evident, for example, in the Home Office publication *Living without Fear* (1999) and in the enactment of s11(4)(d) of the Family Law Act 1996 which, if implemented, would have mandated the court to have regard to 'any risk to the child attributable to' a person living in the child's (proposed) home. See also Hester, M. and Radford, L. (1996) *Domestic Violence and Child Contact Arrangements in England and Denmark*, Bristol: Policy Press.
[2] See Kaganas, F. and Piper, C. 'Divorce and Domestic Violence' in S. Day Sclater and C. Piper (eds) *Undercurrents of Divorce*, (1999) Ashgate, especially p.199.
[3] Hester, M., Pearson, M. and Radford, L. (1997) *Domestic Violence, A National Survey of Court Welfare and Voluntary Sector Mediation Practice*, Bristol: Policy Press.
[4] Piper, C. and Kaganas, F. (1997) 'The Family Law Act 1996 s1(d): How will "they" know there is a risk of violence?' *Child and Family Law Quarterly* vol 9(3) 279-89.

divorce and separation and the harm it was believed to be causing children. This led to a focus on how to maintain the 'separated but continuing' family after parental separation,[5] with continuing contact seen as the key to presenting families as 'unbroken'. This approach was supported by reference to research which suggested that conflict was deleterious to children's development and that 'good' parents came to agreed settlements, preferably via mediation. Parents wishing to use the courts to oppose contact therefore risked being labelled as 'bad'.[6]

Thirdly, research pre-*Re L* issue was suggesting that 'violence continues and even escalates after separation and that child abuse is associated with woman abuse'.[7] This made clear, at least to feminist lawyers, that the decisions and reasoning in contact cases reaching the appeal courts were pivotal for the bringing together of these research insights if law was to protect both women and children after divorce or parental separation.[8]

However, to achieve a higher public profile for the dangers of contact in the context of domestic violence was not easy in the 1990s: that decade also witnessed the vast amount of media coverage and public discussion given to the question of non-resident father contact (or rather lack of contact) with his children after parental separation.[9] Further, both in relation to separated parents and lone mothers, law and policy began to focus on the importance, sometimes an over-riding importance, of the father as a positive influence on the child and, in particular, the importance for the child's present and future welfare of the child's awareness of, and contact with, her genetic father.[10] These public discussions were untrammelled by any reference to fully proven 'facts'.

---

[5] Kaganas, F. (1999) 'Contact, conflict and risk' in S. Day Sclater and C. Piper (eds) *Undercurrents of Divorce*, Aldershot: Ashgate.

[6] B Neale and C Smart, '"Good" and "bad" lawyers? Struggling in the Shadow of the Law' (1997) 19(4) *Journal of Social Welfare and Family Law* 377-402; see, also, Cantwell, B. and Scott, S. (1995) 'Children's wishes, children's burdens' JSW&Fam Law. 17(3), 377..

[7] Kaganas (2000) n 1 above; see also Mullender, A. and Morley, R. (eds), *Children Living with Domestic Violence: Putting Men's Abuse of Women on the Child Care Agenda* (1994) London: Whiting and Birch; O'Hara, M., "Domestic Violence and Child Abuse - Making the Links" *Childright* (1992) No. 88, 4-5.

[8] See, for example, Humphreys, C. (1999) 'Judicial alienation syndrome – failures to respond to post-separation violence' *Family Law* 29, 313-16.

[9] See, for example, F. Kaganas 'Domestic Violence, Men's Groups and the Equivalence Argument' in A. Diduck and K. O'Donovan (eds) *Feminist Perspectives on Family Law*, (2006) Glasshouse, Cavendish: London.

[10] Reflected for example in a change of case law relating to allowing blood tests to establish paternity; see J**.** Fortin**,** (1999) 'Is Blood Really Thicker than Water? Re D' [1999] *CFLQ* 435.

There were two reasons for this 'ungrounded' debate. First, the family courts always sat in private in order to protect the children involved[11] and so the facts of contested cases were not known – only the version publicised by the 'unsuccessful' non-resident parents. Secondly, family lawyers and mediators[12] had imbibed, and then found very useful as a tool in seeking agreed settlements between parents in conflict over contact, the general gist of research which suggested that contact was beneficial for children. Judicial decisions were justified with reference to the 'obvious' good of contact for children such that there appeared to be a judicial presumption that contact would be ordered. Research suggested that what resulted was a lack of detailed analysis as to whether contact was beneficial for a particular child.[13]

By the time that the judgement was given in *Re L*, however, these assumptions about the welfare of the child *were* beginning to be questioned. In her new judgement Kaganas draws attention to the article written by the then Hale, J. in 1999 ('The view from Court 45'[14]) which pointed out the lack of clear research evidence for the benefits of a child's contact with a non-resident parent. Rodgers and Pryor similarly challenged the assumption that children are generally harmed by divorce[15] and Wall J had chaired a committee that issued a Consultation paper on contact in cases where there is domestic violence.[16] Academics were also beginning to point out that strong adherence to the assumption that contact is beneficial was leading the courts to 'explain' parental opposition to contact as implacable (unreasonable) hostility and a child's reluctance to stay overnight with a non-residential father as 'the result of deliberate alienation by the other parent'.[17]

---

[11] However, since 27 April 2009 the press have been allowed to attend hearings if permitted to do so by the judge: see *Practice Direction: Attendance of Media Representatives at Hearings in Family Proceedings - High Court and County Courts*, 20th April 2009, Sir Mark Potter, P.

[12] See, for example, M King 'Being Sensible: Images and Practices of the New Family Lawyer' (1999) *Journal of Social Policy* vol 28, 249-273; Piper, C. **'**How Do You Define a Family Lawyer?' *Legal Studies* (1999) vol 19(1) 93-111.

[13] See, for example, Piper, C. *The Responsible Parent: A Study of Divorce Mediation*, (1993) Harvester Wheatsheaf: Hemel Hempstead; Rhoades, H. (2002) "The 'No Contact Mother': Reconstructions of Motherhood in the Era of the 'New Father'" *International Journal of Law, Policy and the Family* 16(1) 71-94.

[14] *Child and Family Law Quarterly* [1999] Vol 11(4) 377-386.

[15] Rodgers, B. and Pryor, J. (1998) *Divorce and Separation: The Outcomes for Children*, York: Joseph Rowntree Trust.

[16] Advisory Board on Family Law (2000) Children Act Sub-Committee *A Report to the Lord Chancellor on Contact between Children and Violent Parents*, London: TSO.

[17] Piper, C. 'Assumptions About Children's Best Interests' *Journal of Social Welfare and Family Law* (2000) vol 22(3) pp 261-276; see also Davis, G. and Pearce, J. (1999) 'The welfare principle in action' *Family Law* 29, 144-8.

Pre *Re L* case law

The specific legal context can be found in case law from 1992 to 1998. *In re H (Minors) (Access)* [1992] 1 FLR 148, Balcombe LJ had stated (at 152) that only "cogent reasons" would justify not awarding a contact order order, in *Re W (A Minor) (Contact)* [1994] 2 FLR 441 Sir Stephen Brown stated "It is quite clear that contact with a parent is a fundamental right of a child, save in wholly exceptional circumstances" (at 447) and *In re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124 Sir Thomas Bingham MR re-asserted (at 128) the presumption that contact was 'almost always' in the child's interests. Further, where potentially weighty reasons for no contact were presented to the court the response might still be an order for supervised or indirect contact with insufficient investigation of the benefit or safety of such measures.

However, two years before the *Re L* judgment Wall J had posed the question which explicitly brought together the presumption of contact and the growing concern about domestic violence.[18] He asked whether it would be in the best interests of children 'to impose an order for contact on a mother who is caring for them well in favour of a father who has treated her with such violence as to give her good and valid reasons to oppose contact?'.[19] His answer was that 'as a matter of principle, domestic violence of itself cannot constitute a bar to contact. Each case must inevitably be decided on its facts. Domestic violence can only be one factor in a very complex equation.' Nevertheless, in several other cases at this time Wall J questioned the presumption of contact in cases of violence.[20]

Wall J's approach therefore paved the way for change and the decision in *Re L*, in the light of the evidence presented in the consultation and subsequent report,[21] had the potential to give more weight to the effects of domestic abuse when evaluating the best interests of the child. It could also define domestic violence more widely to include the long and short term effects of the child witnessing emotional or physical abuse, the potential harm to the child via the effect of abuse on the child's mother and her capacity to parent, and the potential harm of continuing contact with an

Comment [F1]: Change?

[18] In the case of *In re H (Contact: Domestic Violence)* [1998] 2 FLR 42.
[19] Ibid at p.56.
[20] See Kaganas n 1 above at 312.
[21] Advisory Board on Family Law (2000) fn 17 above.

inappropriate role model. Further, some commentators had argued for a presumption against contact to be established in these circumstances.[22]

The strengths and weaknesses of the original *Re L* case

Re L did bring change. In line with the recommendations of the Report of the Advisory Board on Family Law[23] the court limited the operation of the 'presumption' in favour of contact. Indeed, Thorpe LJ preferred the word 'assumption' as, he said, a presumption could impede the court's assessment of welfare. Butler-Sloss P set out a new approach for the courts which entailed, first, investigating and adjudicating on allegations of violence. To have any effect, however, an allegation had to be substantiated by proof of past violence. The court did not appear to attach significance to the risk of future harm, an astonishing omission given the Family Division's concern with future risk in child protection cases.

Butler-Sloss P then specifically noted that the welfare checklist - a list of factors which the court must consider when determining the best interest of the child - should be applied, and that it should be used in the light of the expert report compiled by Drs Sturge and Glaser on the wide ranging direct and indirect effects of domestic violence on children. The court could then come to a decision as to whether contact should be denied. The court would, therefore, need to balance factors for and against contact in relation to the child in question.

The judges agreed that domestic violence was not a bar to contact. At most, domestic violence, and possibly a few other considerations, could 'offset' the 'assumption' in favour of contact. Further, the judgment of Butler-Sloss P can be read as being limited to a narrow definition of domestic violence[24] despite the availability in 2000 of evidence justifying a wider definition. Thorpe LJ also stated that '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'.[25]

Comment [F2]: Considerations? Parental problems?

[22] See, for example, Hester, M. and Radford, L. (1996) *Domestic Violence and Child Contact Arrangements in England and Denmark*, Policy Press.
[23] Ibid.
[24] See Kaganas n 1 above, pp 316-7.
[25] [2000] FLR 334 at 244A.

The revised judgment

The new judgment successfully sought to respond to the shortcomings of the original judgment in the ways outlined below.

1. The new judgment states that the courts should determine all cases with reference to the checklist rather than the assumption that contact is beneficial.
2. The judgement queries - in the light of research evidence - the appropriateness of the assumption that contact is in the child's best interests when the context is that of a contested and highly conflictual case where contact is likely to be accompanied by circumstances upsetting to the child. Instead the revised judgment states that where the court decides that there has been domestic abuse or there is a risk of significant future harm, the court should assume that there will be no contact. Such an assumption could be displaced only by sufficient and weighty factors in favour of contact. Further, that the expressed desire of an abusing father to attend a course and/or to 'change' will not constitute such a factor. Only evidence of actual change should be weighed in the balance.
3. The judgment adopts a broader definition of domestic violence than that evidenced in the original judgments. It also upholds the idea promoted in the Sturge and Glaser report that the use of domestic violence by one parent against another is a 'failure' in parenting and makes much clearer that the courts should take this failure into account.
4. The judgement also makes clearer the court's view that the so-called parental alienation syndrome and also the notion of 'implacable hostility' are not 'conditions' and are based on assumptions not supported by research. The judgement refers to research which was available at the time of *Re L* and could have been used to support different arguments.
5. Kaganas further argues that the focus on the mother as 'the problem' is a social and judicial construction which should be challenged. Instead she suggests that the problems on which the courts should focus are the parental relationship, the parenting capacity of the non-resident parent, and the effect of diminishing (further) the parenting capacity of the resident parent by continued contact with the perpetrator of abuse.

6. Finally, the judgment gives a detailed explanation of what would count as adequate evidence not only for the purpose of establishing that domestic violence has taken place but also for establishing a risk of future harm.

Subsequent developments

Factual findings of harm

The *Re L* case was important in that it ensured domestic abuse became an important issue in the context of contact. Best practice guidance was issued in 2002[26] and, more recently, detailed guidance for the courts has been issued in the form of Practice Directions in 2008 and 2009. The fact-finding process is now detailed and established. However, the process is one which abusing parents can also use to produce counter allegations and depends too heavily on evidence of past harm.

No presumption against contact

The judgements in *Re L* did not follow the recommendation of the Sturge and Glaser report and create a presumption against contact. Nor did they consider sufficiently the issue of the harm caused to children by the conflict surrounding court cases. There is still an assumption to be offset – to be rebutted by proven evidence of violence and by an 'amount' of violence which weights the welfare balance against contact. Further the change of nomenclature to 'assumption' was inadequate to prevent a narrow - or non-existent - use of the welfare checklist.

The 'hostility' of, and 'alienation' by, the mother

The original judgement stated that parental alienation syndrome (PAS) was not a 'condition', but that was insufficient clarification to prevent references to the syndrome which might obscure legitimate reasons for parental opposition to contact. For example, the Court of Appeal in *Re C (Prohibition on Further Applications)* [2002] EWCA Civ 292 did not appear to have explicitly denied the existence of PAS.[27]

[26] See, for example, Advisory Board on Family Law Children Act Sub-Committee (2002) *Report to the Lord Chancellor on the Question of Parental Contact in Cases where there is Domestic Violence*, London: HMSO, section 5: 'Guidelines for Good Practice on Parental Contact in cases where there is Domestic Violence'.

[27] For example, 'I would say to Mr. C that his view of the significance of parental alienation syndrome may have obscured other more obvious indicators that M herself is giving' *(*per Lord

'Implacable hostility' was also still used in contact cases after the judgement in 2000 with results potentially detrimental to the child concerned. For example in *Re C (Residence Order)* [2008] 1FLR 211 – which in parts reads more like a marketing exercise for the Family Division than a reasoned judgment - an order was made transferring residence from the mother to the father. Ward LJ endorsed the two main reasons apparently given by the judge – that the mother's opposition to contact 'was intractable' and that 'Her failing as a mother was to isolate this little girl'.[28] He noted that the judgement was 'predicated on a basis that restoration of the relation between L and her father would be in L's best interest. It plainly would be so.' [29] Yet at that point it was not plain: L had a close relationship with her half brother, there was a 'very strong bond' with her mother, her father was 'a virtual stranger' to her and there was no discussion of the 'isolation' factor.

The case was referred back for outstanding questions to be resolved, including 'contact for the mother, if she wants it'[30] but there was no urging of such contact or discussion of the harm to the child stemming from lack of contact with that parent. What there was, however, was the following extraordinary statement: '[W] eek after week fathers come to this court protesting that the court is powerless to enforce its orders … even though the long-term damage to the child is perfectly obvious … This time the boot is on the other foot, and if a different conclusion has been reached in this case then let it be shouted out from the rooftops'.[31]

Constructions of mothers and fathers

Re L left the court with discretion to continue to give considerable 'positive' weight to the perpetrator's promises to attend classes and amend his behaviour.[32] The resulting detriment to the mother can be seen clearly in the recent case of *Re P (Children)* [2008] EWCA Civ 1431 in which domestic violence on the part of the father had been proven in the lower court and the 8 year old had told the reporter that when his father

---

Justice Thorpe at para 14). See also T. Hobbs 'Parental Alienation Syndrome and the UK Family Courts - The Dilemma' [2002] *Fam Law* 381 at p.386.

[28] At 215 (see also para 21).

[29] Ibid.

[30] Ibid at p.218, para 31.

[31] Ibid at p. 217, para 26.

[32] Admittedly there was little research evidence by 2000 about the shortcomings of programmes for spouse-abusers but the point is still valid that the courts put too much weight on verbal assurances of attendance and also on the utility of such.

shouts or smacks him 'I curl up and get small and hide my face'.[33] Attendance at an anger management course for the father was endorsed by Ward LJ who stated that the father could then 'explain his feelings of anger and bitterness at this whole horrible six years of unhappiness, from the day the marriage broke down, his being removed from the home, the constant difficulties over the children. It is enough to make any ordinary man just a little bit angry, but that anger has to be contained'.[34] Such a statement exudes sympathy rather than condemnation and, moreover, fits uneasily with the further requirement that the mother, although the judge had found that she was not suffering from a mental disorder, [35] undergo some form of therapy and counselling 'which might go some little way to assuaging the father's implacable conviction that she is a woman with severe mental problems such as spill over to the detriment of his children'.[36]

Indirect and supervised contact

Finally, the original judgment did not give sufficient attention to the problematic nature of indirect and supervised contact. Judges have continued to see supervised or supported contact 'as an extremely useful' measure, especially in cases where there has been previous violence or alcoholism.[37] However, there are outstanding questions as to the level of supervision and the safety of the child concerned.[38]

[33] Ibid para 31.
[34] Ibid para 36.
[35] Who on the father's assertion had suffered 66 court hearings – see para 4.
[36] Ibid para 37.
[37] Perry, A. and Rainey, B. (2007) 'Supervised, Supported and Indirect Contact Orders: Research Findings' *International Journal of Law, Policy and The Family* Vol 21(1) 21-47 at p. 36.
[38] Ibid at p.37.