Appeal in re M

The child G is a boy born on the 24th January 1991 and is now 9 years old. He lives with his mother. The parents married in March 1987. The marriage was not happy and the mother obtained an injunction against the father based upon his violence towards her. He was charged with grievous bodily harm but the criminal proceedings were not pursued. The mother obtained an ouster order. The judge found that the father ´trashed´ the house when he left under the order. The child was born after they separated and initially the father denied paternity, but it was established in March 1992. When the child was 18 months he saw his father on a regular fortnightly basis in a contact centre in the presence of his mother. This form of contact lasted until November 1997, a period of over five years. No effort was made to move the contact on from supervision by the mother in the contact centre. The contact came to an end after an argument between the parents in front of G who subsequently said that he did not want to see his father. The mother remarried in July 1997 and has a child by that marriage, born in August 1998. The father started proceedings in February 1998. Attempts were made to restart contact. The child was taken to the contact centre but he refused to see his father. By the date of the hearing the boy had not seen his father for 2 years.

The application for contact came before His Honour Judge Rudd on the 2nd September 1999 and he gave a written judgment on the 8th October 1999. In it he set out the unfortunate procedural history of the case in that it had been variously before a deputy district judge, a recorder and three different circuit judges. One effect of that history, relating to the direction given in respect of the evidence of the court welfare officer, formed part of the submissions on appeal to which I shall refer later. The judge refused an order for direct contact and ordered indirect contact by letters, cards and Christmas and birthday presents. He refused permission to appeal, which we granted.

Although there was a background of violence during the marriage and it remains a factor which, the judge found, had left its mark on the mother, unlike the other appeals before us, violence does not appear to me to be the main cause of the refusal of contact by the mother. The judge formed the view that the source of the problem was the long period of contact at the contact centre and that the matter should have been tackled years before. It would seem that for, a normal boy, the contact over the years in the contact centre must have lacked stimulus and interest and the relationship between the father and son does not appear to have had an opportunity to blossom and develop. In the psychiatric report, unstimulating experiences which were lacking in interest, fun or in extending the child and his experiences, were included among the risks of direct contact with the non-resident parent.

The main issues on the appeal were the conclusions of the judge on the attitude of the mother, the approach of the judge to the problems associated with the court welfare officer and to the evidence of a jointly instructed forensic psychologist, Dr Lowenstein.
I shall deal first with the evidence of the court welfare officer. At an earlier hearing she was directed to provide a report. She produced a report dated the 12th November 1998 in which she recommended a phased reintroduction of contact. The attempts at contact broke down and she wrote a further report in which she expressed the view that G had suffered serious emotional abuse in the breakdown of contact and she was very critical of the mother. The mother made a complaint about the court welfare officer that was investigated and in part upheld. The court welfare officer then declined to attend the hearing and was supported in that decision by the Practice Manager.

At an earlier hearing another judge giving directions was told of her refusal to attend court and give evidence and he directed that another court welfare officer should attend and present the report. She came before Judge Rudd with no knowledge of the family and was unable to give any direct evidence about the family. Judge Rudd, entirely justifiably in my view, was very critical of the refusal of the court welfare officer who wrote the report to attend and give evidence. I entirely agree with him that it is not up to her to decide if she would

or would not give evidence. Her duty was to give evidence to the court if called upon to do so. Her failure to comply with best practice in compiling the report may cast doubt on its value. It does not excuse her refusal to assist the court.

Judge Rudd was placed in a very difficult position. Another judge had made an unfortunate order. There was no point in the second court welfare officer attending court. She was wasting her time and that of the court. The judge giving directions should have grasped the nettle and either directed that there would not be a report at all for the court or another court welfare officer would be directed to start again and provide a fresh report.

A particular problem for Judge Rudd was the bald statement made by the court welfare officer that the child had suffered emotional harm without providing any evidence to support it. The report was obviously controversial but the father relied upon it. The two alternatives, in my view, at that stage, were either to order the court welfare officer to attend for cross-examination or to refuse to admit it as evidence. The judge, unfortunately, fell between two stools by accepting the report as evidence and then rejecting it without hearing the maker of the report give oral evidence.

This was a decision that the appellant father was entitled to criticise. I do not consider however that the judge ´s error advanced the father´s case, since the judge equally was not entitled to rely upon the report, untested by cross-examination, when it was challenged by the mother. I hope that this most unusual incident with a court welfare officer will never again occur. I have great sympathy with the judge in his predicament in a difficult case where he was entitled to expect help from the court welfare service.

The solicitors for the parties agreed that they should jointly instruct a child psychiatrist to advise on contact and His Honour Judge Milligan made the order. It appears that the parties´ solicitors had great difficulty in finding a child psychiatrist and eventually instructed Dr Lowenstein who made a report. He saw both parents and G and came to the conclusion that this was a typical case of parental alienation syndrome. As the judge said, Dr Lowenstein has been closely associated with recognition of this syndrome. He recommended therapy, at least 6 sessions to be conducted by himself, followed by a further report. Since it was therapy, there would be problems in financing the therapy and subsequent report.

The judge did not accept the unsubstantiated assertion of the court welfare officer as to emotional abuse of G. He was equally unhappy about the findings and conclusions of Dr Lowenstein. In the report of Dr Sturge and Dr Glaser, they indicated that parental alienation syndrome was not recognised in either the American classification of mental disorders or the international classification of disorders. It is not generally recognised in psychiatric or allied child mental health specialities.

It would be fair to say that Dr Lowenstein is at one end of a broad spectrum of mental health practitioners and that the existence of parental alienation syndrome is not universally accepted. 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.

That unhappy state of affairs, well known in the family courts, is a long way from a recognised syndrome requiring mental health professionals to play an expert role. I am aware of the difficulties experienced in some areas in getting the appropriate medical or allied mental health expert to provide a report within a reasonable time. It was, however, unfortunate that the parents´ lawyers not only did not get the medical expert ordered by the judge, that is to say, a child psychiatrist, (although in many cases a psychologist would be appropriate), but, more serious, were unable to find an expert in the main stream of mental health expertise.

The judge, in my view, was entitled to reject the report and the oral evidence of Dr Lowenstein, even though

the psychologist was jointly instructed. Lord Goff of Chieveley said in ***re F (Mental Patient: Sterilisation)*** [1990] 2 AC1 at page 80 that experts were to be listened to with respect but their opinions must be weighed and judged by the court.

The judge said "I cannot accept the effect of what Dr Lowenstein has told me, namely that PAS is such a serious state that the child involved and the parent should be subjected to treatment by way of therapy with direct threats to the mother in the event of non-co-operation. It appears from the literature that some schools of PAS thought advocate the immediate removal of the child from the alienating parent and thereafter no contact with the alienating parent for a period. It also appears that ´long term psycho- analytically informed therapy in the order of years rather than months´ is the treatment of choice."

I do not accept the submission of Mr Bates that the judge did not give reasons for rejecting the evidence of Dr Lowenstein. The case for the father was largely based upon the suspect conclusions of the court welfare officer of emotional harm suffered by the child. The judge did give reasons and it was well within his judicial function not to accept that evidence.

The main ground of appeal was the judge´s error in concluding that the mother was not hostile to contact. The judge found that the father genuinely wanted to re-establish and continue a relationship with his son. The judge also found that the mother was unenthusiastic about contact but that she had kept it going for 5 years. He found her to be a credible witness and he accepted her evidence. He accepted that she did not consciously and directly attempt to persuade G not to have contact.

The judge said "Given a long period of unsatisfactory contact at the contact centre, the unsatisfactory relationship which [the mother] had with [the father], and her present and satisfactory family circumstances, I am not surprised that G has come to the conclusion that contact with his natural father is something of an intrusion into his life. The row between them in his presence was the final straw for him and probably for mother as well."

The judge having rejected the evidence of the court welfare officer and of Dr Lowenstein, there was no evidence of serious harm to the child from the cessation of contact. The judge did not consider the mother to be a hostile mother nor one who would refuse to obey court orders. But she did not feel able to put pressure on the child nor force him to see his father. She would facilitate contact if he wanted it. The judge was not prepared to put pressure on the mother and could not conceive that he would commit her for contempt if an order for contact were not complied with.

It was not a case for coercion or punishment. He directed himself that contact was the right of the child and the mother had no right to prevent contact between the child and his father. But in order to effect contact it would be necessary to subject the child to therapy recommended by Dr Lowenstein and that would require the co-operation of the mother. She was not prepared to take part in therapy and would not consent to the child taking part. The judge said that he would be extremely reluctant to compel a child of 8 to submit to therapy by a psychiatrist, (in fact a psychologist) against the wishes of his mother unless his interests had been represented in the case by the Official Solicitor. There was no evidence before him that the boy was other than a normal healthy boy with no requirement for psychiatric intervention save, allegedly, for the issue of contact. If he were forced to see his father at this stage it would have a detrimental effect upon him and his long-term relationship with his father. He concluded

"I must do the balancing act and exercise some common sense and proportionality in this case." Bye Bye father.