Implacable hostility; weasel words for emotional child absue

Roger Hillman A. Implacable Hostility "implacable" - OED definition, adjective, -that cannot be appeased, inexorable. Now a term of art in contact cases.

First judicial use of the phrase- Re B (A minor) (Access) [1984] FLR 648 Court of Appeal, Sir John Arnold. P and Latey J. Parents were unmarried and cohabited for approximately 18 months after birth of child. Following separation, there was a period of three months of contact which then ceased. Mother refused adamantly to countenance any further contact. Father applied for contact. At first instance contact was refused. On appeal;- Per Latey J."The fact of the mother's invincible opposition, which I think in this case can fairly be paraphrased as her implacable hostility, is not in dispute". Dismissing the appeal -Although the father argued that the mother's implacable hostility was not a ground for refusing access, it was a factor which had to be taken into account. Save in exceptional circumstances, it was of very real importance in the interests of the child's emotional health that there should be contact with the non-custodial parent. Where an exception had to be made, it was because to enforce, impose, or seek to enforce or seek to impose access would have adverse effects on the child and injure it. In this case it was clear from his judgment that it was to that conclusion that the judge had arrived. He had carefully considered all the relevant matters and it was impossible for an appellate court to intervene. The court did however state that the judge's decision was not necessarily final and ordered that one year on from the hearing date there should be a further welfare report which should be sent to both parties to prompt further consideration of the contact position. Subsequently the Court of Appeal have set out the guiding principles to be used by the courts in most contact cases.

The leading case itself concerned a hostile mother in a keenly contested issue of contact, the facts of which bare close examination as evidencing one judicial approach to handling this type of case;- Re O (Contact: Imposition of Conditions) [1995] 2 FLR 124 Sir Thomas Bingham MR, Simon Brown and Swinton Thomas LJJ. Unmarried parents cohabited but separated prior to the birth of the child. The father breached a non molestation order and was subject to a suspended committal order. The father regularly sought contact and the mother made it clear that she resisted this happening. It was noted that the mother would not allow the child to go to father's home or for the father or any of his family to visit hers. She firmly believed it would be detrimental to the child's well-being for him to have any contact to his father. Two successive direct contact orders using a family centre broke down within a short period of being made. The father applied for a penal notice to be attached and mother applied for the contact order to be revoked as the child was too distressed when contact took place. The court welfare officer reported that contact would only ever work in this case if the mother supported contact during the period until the child got to know his father. As there was no prospect of this happening the CWO indicated she could not assist the court any further. The father then accepted that direct contact was not practicable at that stage, but sought wide ranging indirect contact. The first instance judge sought to make a range of orders focused on indirect contact which placed a duty upon the mother to send the father photographs of the child, regular reports of his progress at school and notification of any significant ill health he suffered. The judge required the mother to accept receipt through the post of cards, letters and gifts sent by the father. A review was ordered after six months back before the same judge. Within a few months of this order the mother sought to discharge the part of the order which required her to give information about the child to the father, admitting that she was not prepared to have any form of contact with the father whether direct or indirect. The judge refused to alter the part of the order which related to giving the father information and altered the order to additionally require the mother to accept cards etc from either postal delivery or via the welfare officer, to read to the child the contents of any cards and letters and to give him any gifts sent by the father. The mother appealed this order arguing the court had no power to compel her to do any of these things. Bingham MR dismissed the appeal and held; -

That section 11(7) of the Children Act 1989 "provided a wide and comprehensive power" to make orders which will be effective to ensure contact. He also took the opportunity to restate fundamental principles;- That in accordance with the welfare principle it the welfare of the child which is the court's overriding concern. The courts are concerned with the interests of the mother and father only in so far as they bear on the welfare of the child. -Where a child's parents are separated and he is in the care of only one of them, it is almost always in the interests of the child that he or she should have contact with the other parent. -The court has power to enforce orders for contact, which it should not hesitate to exercise where it judges that it will overall promote the welfare of the child to do so. -Infrequently the court will not be able to order any direct contact where to do so would injure the welfare of the child.

What was typically involved in such cases was a serious risk of major emotional harm. The court should take a long to medium term view of matters and not give undue weight to short- term or transient problems. -Where it was not possible to have direct contact it was highly desirable for there to be indirect contact, so that the child grew up knowing of the absent parent. In the light of the Court of Appeal's guidelines in Re O, a different emphasis was placed upon another example of a very hostile mother in the case of;- Re D (Contact: Reasons for Refusal) [1997] 2FLR 48 Court of Appeal, Staughton LJ and Hale J.

Unmarried parents, who had never cohabited. After the ending of their relationship, Mother refused contact and argued father had been violent towards her. Father's first application when child aged 2, for a Parental Responsibility Order and contact failed. When child aged 4, father brought a further application for contact which failed again, the judge at first instance finding that the mother was genuinely fearful for her self and the child. Father's appeal was refused. The court rejected any suggestion that race was a material factor here (father was black and the mother was white) in view of the child's positive image of black people in general. It was further argued that the judge, having found that the mother's fears of the father were reasonable and justified, ought to have balanced the risk of harm to the child against the undoubted benefit of having contact with his father. Given the judge's finding on the evidence the Court of Appeal believed he could properly have concluded that it was not currently in the child's best interests to have contact with his father. The judge had not sought to close the door to the father for all time. His view was that the father should reapply at some future point when the mother could be reassured that all would be well. He had made clear findings as to the father's conduct and the mother's beliefs as to the harm that would be suffered. It could not be said that the exercise of the judge's discretion was outside the ambit within which reasonable disagreement was possible, and the appeal failed accordingly.

The term 'implacable hostility' usually referred to the type of case where no good reason could be discerned for a parent's opposition to contact. In such cases, the court would be very slow to reach the conclusion that contact would be harmful to the child. Such a conclusion would normally only be reached where the court was satisfied that there was a serious risk of harm in ordering contact. In other cases, a parent could have genuine and rationally held fears for the child or the parent him/herself. In such cases, where there were good reasons for opposing contact, it could be misleading to describe the parent's opposition to contact as 'implacable hostility'. Another example of a possible softening of the original (Re A) approach towards implacably hostile mothers was seen in a 1999 case in which the cause of the mother's attitude was plainly regarded as significant. Re D (A Minor) (Contact: Mother's Hostility) [1999] 2 FLR 1 Court of Appeal, Balcombe and Waite LJJ.

Unmarried parents who had cohabited but separated before the birth of the child with the mother alleging that

father was violent towards her. Father had behaved in an intimidating way subsequently to mother and at later court hearings. Father applied for contact when the child was one year old and was granted a supervised interim contact order for three trial sessions. These were unsuccessful. Contact was suspended. Mother opposed any further contact, arguing it would be too unsettling for the child. Father's contact application was dismissed and he appealed. Held - dismissing the appeal The approach to contact had not changed since the Children Act 1989, and the authorities which predated the coming into force of the Act were still relevant. One started with the premise that the child's right was to know both its parents. However, there might be cases where there were cogent reasons why the child should be denied that opportunity. The court should take into account, as one of the factors in its decision-making, whether the father had had some contact with the child since the child's birth.

The implacable hostility of the mother towards contact was a factor which was capable, according to the circumstances of each particular case, of supplying a cogent reason for departing from the premise that a child should grow up in the knowledge of both his parents. The mother's attitude towards contact put the child at serious risk of major emotional harm if she were to be compelled to accept a degree of contact with the natural father against her will, and this view was supported by the welfare officer.

The same theme of giving greater weight to the causes underlying why extreme hostility may have come about, was also seen in a strong Court of Appeal=s major guideline case on Domestic Violence . The court was heavily influenced by Wall J, who as the Chairman of the Children Act Sub- Committee of the Advisory Board on Family Law, delivered a report on parental contact in domestic violence cases. The committee's recommendations were presented to the Lord Chancellor and were published (see "A Report to the Lord Chancellor on the Question of Parental Contact in Cases where there is Domestic Violence" (Lord Chancellor's Department, 12 April 2000)). Re L (Contact: Domestic Violence) [2000] 2FLR 334 Court of Appeal, Dame Elizabeth Butler Sloss P., Thorpe and Waller LJJ.

The court specially arranged for appeals from four contact cases involving allegations of domestic violence to be listed together and took the step of also inviting the Official Solicitor to act as Amicus Curiae. The OS in turn at the court's invitation instructed a high powered team of leading consultant child- psychiatrists (Messrs Sturge and Glaser) to report in general on the significance of domestic violence for children in the same household, and in particular on the four subject cases.

There is no substitute to reading the general discussion by the President of the family Division in this case of Contact issues in general, the correct approach to domestic violence and her review of the psychiatric experts' conclusions on contact. The essential conclusions of the court were as follows;- -A court hearing a contact application in which allegations of domestic violence were raised should consider the conduct of both parties towards each other and towards the children, the effect of the violence on the children and on the residential parent, and the motivation of the parent seeking contact. -

On an application for interim contact, when the allegations of domestic violence had not yet been adjudicated on, the court should give particular consideration to the likely risk of harm to the child, whether physical or emotional, if contact were granted or refused. The court should ensure, as far as possible, that any risk of harm to the child was minimised and that the safety of the child and the residential parent was secured

before, during and after any such contact. Family judges and magistrates needed to have a heightened awareness of the existence and consequences for children of exposure to domestic violence between their parents or other partners. -

Where allegations of domestic violence were made which might have an effect on the outcome, those allegations must be adjudicated upon, and found proved or not proved. -There was not, and should not be a presumption that on proof of domestic violence the offending parent had to surmount a prima facie barrier of no contact, but such violence was a factor in the delicate balancing exercise of discretion carried out by the judge applying the welfare principle and the welfare checklist in s 1(1) and (3) of the Children Act 1989. -

In cases of proved domestic violence, the court had to weigh the seriousness of the domestic violence, the risks involved and the impact on the child against the positive factors, if any, of contact. The ability of the offending parent to recognise his past conduct, to be aware of the need to change and to make genuine efforts to do so would be likely to be an important consideration when performing that balancing exercise. -Where there was a conflict between the rights and interests of a child and those of a parent, the interests of the child had to prevail under Art 8(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

An American Perspective See March [2002] Fam Law 182 Parental Alienation Syndrome "One parent (of either gender) seeks to alienate their child(ren) from the other parent; this desire may be either conscious or subconscious. Severe PAS becomes self- perpetuating: the child refuses contact with the alienated parent, having internalised a host of powerful negative messages from the alienating parent." Note this was briefly considered but rejected by Messrs Sturge and Glaser. B.

The Enforcement of contact orders The armoury of orders available for enforcement of contact essentially comprise the following;- a)-Endorsement of Penal notice on the contact order But see Re N (A Minor) (Access: Penal Notice) [1992] 1FlR 132 Court of Appeal, Mustill, LJ and Waite J. Held that breach of a defined access order could justify the imposition of a term of imprisonment against the parent who refused to comply with the order. Whether, and if so how and when, that weapon of last resort should be used was essentially a decision for the court hearing the case. Need to phrase contact order in enforceable terms to which a penalty notice could attach. An order for reasonable contact cannot have a penal notice attached.

See D v D (Access: Contempt: Committal) [1991] 2 FLR 34 Court of Appeal, Dillon and Ralph Gibson LJJ An access order to be capable of having a penal notice attached to it must be framed in defined terms specifying the positive acts that must be carried out or the acts that must be abstained from. b)-Seeking further directions With a view to bringing forward a distant hearing or having case put back into lists for reconsideration if new circumstances have arisen. c)-Application to commit Resulting in a fine, costs order, a suspended committal or an actual committal. See case of A v N (Committal: Refusal of Contact) [1997] 1 FLR 533 Court of Appeal, Beldam and Ward LJJ Unmarried parents cohabited until child was age 3 when they separated. Contact was refused as Mother refused to accept that applicant was father of the child even after DNA testing confirmed this. Supervised contact at home of paternal grandmother was ordered (in view of some violence and drugs involvement of father), but mother refused to permit this to happen. Indirect contact was ordered as in turn was contact at a family centre with social workers supervising so that mother

would not have to meet father at any stage. In all some six separate contact orders of different types over a period of 15 months were all flouted. The mother declared that she would go to prison rather than obey any contact order. A final suspended committal order was made conditional upon contact being allowed on the next occasion it was due. The mother again refused and the first instance judge ordered immediate committal for a period of 42 days imprisonment. The mother appealed against the first instance judge's refusal to vary the order. The appeal was dismissed.

It was stated "it is perhaps appropriate that the message goes out in loud and in clear terms that there does come a limit to the tolerance of the court to see its orders flouted by mothers even if they have to care for their young children. If she goes to prison it is her fault, not the fault of the judge who did no more than his duty to the child which is imposed upon him by Parliament." As to guidance to courts on sentencing for contempt in family context see Hale LJ in Hale v Tanner [2000] 2 FLR 879. d)-Seek a Section 37 Report with a view to possible supervision or care orders being made. Rather a dangerous double-edged sword, but if serious concerns about welfare of the children, this course may enable an independent check to be made upon them. e)-Consider residence application by parent deprived of contact See encouragement for this approach by Court of Appeal in Re S (Minors) (Access) [1990] 2 FLR 166 Balcombe LJ stated;- "In the present case, although B has been with his mother since a very young age, it is clear from the evidence that, unusually, the father is able to provide an acceptable custodial arrangement. The usual problem in this type of case where the custodial parent resolutely refuses to obey an order for access by the court is that the court has no effective sanction to enforce that order.

Although, like any other order of the court, it can be enforced by penal notice and, if necessary in the last resort, prison for contempt of court, it is a rare case - although I would not go so far as to say it can never happen - that the welfare of the child requires that the custodial parent be sent to prison for refusing to give the other parent access. In this case there is a much more effective sanction. If the mother remains obdurate, as she has hitherto, then it seems to me that the court will have to look at this case afresh and decide whether the welfare of the child B requires that he be given the opportunity to know properly his brother and father even though that may regrettably mean taking him away from his mother. The choice seems to me to lie with the mother." f)-Consider seeking Family Assistance Order See Children Act 1989 Section 16.

But note limits of this type of order, (need for consent etc) and see disapproval of seeking to compel the local authority to organise escorts for prison visiting by children to inmate father, under the guise of an FAO in case of S v P (Contact Application: Family Assistance Order) [1997] 2 FLR 277 g)-Seek separate representation of children and possible involvement of Official Solicitor, with a view to obtaining child or adult psychiatric reports as appropriate to guide and assist court. See cases of;- Re F (Contact: Restraint Order) [1995] 1 FLR 956 Court of Appeal, Nourse and Waite LJJ.

In a case with an implacably hostile mother who resisted all attempts at organising contact, and who refused to co-operate with any assessment of the children ordered by the court, an appeal was allowed from a refusal to permit a further application by father seeking the appointment of the OS to act for the children and leave to instruct a child- psychiatrist. Re A (Contact: Separate Representation) [2001] 1 FLR 715 Court of Appeal, Butler Sloss P., Hale and Potter LJJ. In a complex children dispute in which the court had originally had sufficient concerns about both parents to invite the local authority to become involved, residence orders were eventually made to mother with detailed contact provisions for the father with a Family Assistance Order to smooth the operation of contact. This was successful and good quality contact took place for 6 months. On

the father then seeking staying contact, with support from the Court Welfare Officer, the mother made new allegations of sexual abuse by father. No findings were made one way or the other of any such abuse although further psychiatric reports were ordered on the adults and the child. The mother ceased attending all further court hearings and refused to permit staying contact or indeed any contact to take place or any further assessment of the child. The mother then approached the National Youth Advocacy Service (a respected private charity) and they in turn applied to be allowed to independently represent the four year old child in question as Guardian ad Litem. At first instance this application was refused.

The President allowed the appeal, although directing that the OS should represent the child independently. While as a respectable and independent body there was no objection in principle to NYAS, the feature that the mother had already had dealings with them rendered it unlikely that the father would perceive them as independent. While in future CAFCASS would in suitable cases take this role of separately representing children, until they were fully functioning the OS would do so in this case. Full investigation and findings had to be made to Anail@ the sexual abuse allegations. The OS would accordingly have leave to obtain expert analysis of the evidence on this aspect. In the meantime there would be limited supervised contact.

Future Proposals See the final report of the Children Act Sub Committee (CASC), chaired by Wall J. published n February 2002, entitled- "Making Contact Work" Detailed consideration of this substantial report is beyond the scope of this article, but see summary in March 2002 Family Law 164. Much consideration is given to the possibility of trying to remove contact disputes out of the courts altogether, to be resolved by arbitration or mediation. This would attempt to reduce the confrontational and adversarial aspects of litigation which are seen as both contributing to and exacerbating the overall problem of the break down in communication and trust which so often accompanies contact failure. On enforcement, legislation should be advanced to provide powers to allow the courts to adopt two approaches, either one that was essentially non-punitive or if this failed, one that imposed outright penal sanctions. Suggested new powers;- -Power to refer a parent who disobeys contact orders, to a variety of resources, including information meetings, meetings with a counsellor, or other parenting programmes/classes, -power to refer to a psychiatrist or psychologist (publicly funded at first instance), -power to refer a non-resident parent to an education programme or perpetrator programme if violent or in breach of an order, -power to place on probation with a condition of treatment or attendance at a given class or programme, -power to impose a community service order, with programmes specifically designed to address the default in contact. -power to award financial compensation from one parent to another (for example where the cost of a holiday has been lost or wasted).

Previous CASC recommendations have often made their way rapidly into the case law. The more drastic and sweeping powers now sought may require primary legislation. This is not likely to materialize quickly given the low priority recently accorded by this government to new family law. An alternative may be expansion of what is deemed capable of falling within the ambit of section 11(7) of The Children Act 1989 by way of conditions attached to contact orders. 19th March 2002