WHEN WILL THE COURT SUPPORT A CHANGE OF CARE ARRANGEMENT WHERE A PARENT IS EMOTIONALLY MANIPULATING THE CHILD AGAINST THE OTHER PARENT OR MAKING FALSE ALLEGATIONS OF ABUSE?

Introduction

1. Although the title of this talk appears to contemplate two distinct scenarios, to a large extent they fall to be treated the same. It is in practice very common for parental manipulation of the child against the other parent to be accompanied by false allegations of abuse, whilst, unless the child has been totally insulated from the allegation, the making of a false allegation of abuse by one parent against the other of itself inexorably involves some degree of manipulation of that child. It is the same mischief, the same failure of parenting fundamentally at work in each scenario, though it is probably right to acknowledge that, for the parent dealing with the manipulation or facing the false allegation, it is the latter scenario which carries the greater danger.

2. How to deal with that mischief and failure of parenting is what at the broadest level this talk addresses, but its particular focus is on when the court's response is a change in living arrangements for the child. And that question "when" is answered in two ways – first and predominantly as a matter of law, by looking at how the case-law has developed; but also secondly as a matter of practice because, if acting for the parent victim of such manipulation or false allegations, there are clearly steps to be undertaken and challenges to be overcome to bring about – or increase the chances of bringing about - that very outcome.

Background

3. There is nothing novel in the scenarios being looked at, though it might

be said that the onset of the internet and the revolution in social media have not only made the problem more prevalent, but also added new dimensions to its practice. Emotional manipulation of a child by one parent against the other, the making of false allegations - these have long been sad features of life within and outside the court-room, and they have for some time posed a challenge to the family justice system that it has struggled to meet successfully.

4. Indeed, some of the most heart-wrenching cases to be found in the law reports deal with just such scenarios. A reminder of the head-note and the first two paragraphs of the judgment of Munby J (as he then was) in the seminal and influential case of ***Re D (Intractable Contact Dispute: Publicity)*** [2004] EWHC 727, [2004] 1 FLR 1226 shows that the problem is far from new.

5. The headnote reads as follows:

> "The parents were involved in an intractable contact dispute in respect of one child aged 7. The parents separated in November 1998 and the child lived with the mother. Contact had been problematical from the start and the father had not seen his daughter since December 2001. The mother continually sabotaged contact arrangements by means of threadbare excuses and groundless assertions and allegations over a period of 5 years, resulting in court orders, penal notices, suspended prison sentences and finally a period of imprisonment. There were 43 hearings conducted by 16 different judges after numerous adjournments. The parents' and experts' evidence totalled 950 pages. The case came before Munby J on 11 November 2003 when the father abandoned his battle for contact."

6. And the judgment of Munby J begins in these characteristically frank terms:

> "[1] On 11 November 2003 a wholly deserving father left my court in tears having been driven to abandon his battle for contact with his 7 year old daughter, D. She was born on 2 August 1996. That battle had lasted for precisely 5 years. It was on 11 November 1998, a matter of days after the parties separated on 2 November 1998, that the mother

> petitioned for divorce and on the very next day that she began proceedings for a residence order. From almost the moment when the parties separated there were problems about contact. As matters stand today, direct contact has ceased – it has not taken place since 20 October 2001 and the father has not even seen his daughter since 1 December 2001. Such indirect contact as is taking place is far from satisfactory.
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> [2] From the father's perspective the last 2 years of the litigation have been an exercise in absolute futility. His counsel told me that the father felt very let down by the system. I was not surprised. I make no apology for repeating here in public what I then said in private:
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> 'He is entitled to … I can understand why he expresses that view. He has every right to express that view. In a sense it is shaming to have to say it, but I personally agree with his view. It is very, very disheartening. I am sorry there is nothing more I can do.'
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> I also said this:
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> 'I think there are lessons to be learned from this and I think this is, if for [the] father a heartbreaking occasion, an opportunity [that] in the wider public interest requires to be seized … He has nothing, so far as I can see, to reproach himself with. The system has failed him … I feel desperately, desperately sorry for him. I am very sad that the system is as it is…."

7. Fast forward over a decade to the Presidency of Sir James Munby P (as he now is) and the system remains imperfect, in that there remain cases where emotionally manipulative resident parents and parents prepared to make false allegations still get away with it. But in general terms there does seem, it is suggested, to be a greater readiness, robustness and proactivity from courts – or perhaps more accurately from an increasing number of courts - dealing with these difficult cases.

The shift in approach

8. Ultimately where the child should live is – and has since the coming into force of the Act been - a fact-specific section 1 Children Act 1989 question.

9. However, in the traditional case of a transfer being sought against the background of 'contact' frustration, that paramountcy consideration tended to be steered by a judicial approach that found its most succinct expression in the following dictum of Thorpe LJ in ***Re A (Residence Order)*** [2010] 1 FLR 1083:

> "[18] The transfer of residence from the obdurate primary carer to the parent frustrated in pursuit of contact is a judicial weapon of last resort."

10. Hence, courts tended to be slow (in every sense) to contemplate and take that step.

11. In charting the move away from that approach, the case of ***Re M (Contact)*** [2012] EWHC 1948 (Fam), [2013] 1 FLR 1403 (a decision of Peter Jackson J) is one of some importance, in that, while on its face it is consistent with Thorpe LJ's approach, there appeared to be a greater robustness underlying this decision.

12. This was a case with an all too familiar litigation history. By the time of the final hearing, no contact was taking place, with the children concerned (aged 10 and 8, and influenced by their mother) expressing outward antipathy towards their father, who now sought a transfer of their residence.

13. In those circumstances, Peter Jackson J made a conditional residence order in favour of the father seeking that transfer of residence. That involved the court "[considering] that the father's application for a residence order should succeed", but directing that the order will not come into force if contact resumed, thereby "[allowing] the mother one final opportunity" (see para [76]). As he explained in the following paragraph of his judgment:

> "[A] conditional residence order is in my view appropriate where the court can confidently foresee the circumstances in which it might come into effect".

14. As to the test to be applied, earlier in his judgment, at para [54], he makes clear that, in the "apparently intractable case, careful analysis of the welfare checklist is essential". And whilst he does not explain that comment further, what such an analysis does do is to guard against the tendency to focus solely or excessively either on the primary carer's failure to promote contact or on the purported advantages of the 'status quo' and ensures instead a balanced appraisal of the merits and demerits of the transfer of care option.

15. A significant factor in the change in judicial mood would seem to be the increased and welcome focus on the nature and importance of parental responsibility in the private law sphere.

16. Leading that drive has been McFarlane LJ who, in ***Re W (Direct Contact)*** [2012] EWCA Civ 999, [2013] 1 FLR 494, emphasised the importance of the proper discharge of a parent's parental responsibility where the provision of contact is concerned. It is a theme that has been taken up and expanded upon in subsequent Court of Appeal decisions and one to which McFarlane LJ has more recently returned in ***Re A (A Child)*** [2015] EWCA Civ 910, where he repeats the following key passages of his judgment in ***Re W***:

> "75. In all aspects of life, whilst some duties and responsibilities may be a pleasure to discharge, others may well be unwelcome and a burden. Whilst parenting in many respects brings joy, even in families where life is comparatively harmonious, the responsibility of being a parent can be tough. Where parents separate the burden for each and every member of the family group can be, and probably will be, heavy. It is not easy, indeed it is tough, to be a single parent with the care of a child. Equally, it is tough to be the parent of a child for

> whom you no longer have the day to day care and with whom you no longer enjoy the ordinary stuff of everyday life because you only spend limited time with your child. Where all contact between a parent and a child is prevented, the burden on that parent will be of the highest order. Equally, for the parent who has the primary care of a child, to send that child off to spend time with the other parent may, in some cases, be itself a significant burden; it may, to use modern parlance, be 'a very big ask'. Where, however, it is plainly in the best interests of a child to spend time with the other parent then, tough or not, part of the responsibility of the parent with care must be the duty and responsibility to deliver what the child needs, hard though that may be.
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> …
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> 77. Where there are significant difficulties in the way of establishing safe and beneficial contact, the parents share the primary responsibility of addressing those difficulties so that, in time, and maybe with outside help, the child can benefit from being in a full relationship with each parent ...
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> 78. Parents, both those who have primary care and those who seek to spend time with their child, have a responsibility to do their best to meet their child's needs in relation to the provision of contact, just as they do in every other regard. It is not, at face value, acceptable for a parent to shirk that responsibility and simply to say 'no' to reasonable strategies designed to improve the situation in this regard."

17. Against that legal backdrop, and whilst recognising that judicial approach will vary from one tribunal to another, the patience of many courts with contact obstructers (in whatever form that obstruction takes) seems to be becoming increasingly less, and consequently the preparedness of such courts to countenance transfers of care appears to be correspondingly greater.

18. The desire for swifter court process, the greater understanding of the emotional harm caused to children through contact obstruction, the making of false allegations and parental manipulation (of which more below), the recognition that lengthy entrenchment of parental opposition can otherwise decree the result, and a seemingly greater

readiness to grasp the realities of such cases (and in consequence the nettle) appear to be signalling a more robust judicial approach, certainly in some courts.

19. As to the predominantly false allegations species of case, a good example is ***TB v DB*** [2013] EWHC 2274 (Fam), a case in which Michael Keehan QC (as he then was) (sitting as a Judge of the Family Division) made - what he subsequently described as - "very clear findings that allegations that the mother made against the father and his brother … over the course of many years were false and untrue". These included allegations of past violence and rape, of sexual abuse of and inappropriate behaviour towards the child, and of alcoholism and abduction risk; and he found that the mother's actions in making and pursuing those allegations, in putting the most sinister interpretation on what her child was saying, and in thwarting the father's contact "were not borne of acting in [the child's] best interests but were part of her concerted and long-standing campaign against the father".

20. And all of that led him in a judgment delivered the next day (***TB v DB*** [2013] EWHC 2275 (Fam)), when applying the section 1 statutory welfare test, to discharge the pre-existing shared residence order (which he saw as unworkable) and to replace it with a sole residence order in favour of the father, with contact to the mother.

21. As to a case with a background of unfounded allegations, overridden with overt child manipulation, look no further than ***Re H*** [2014] EWCA Civ 733 (a case informative both for the robust approach taken at first instance and by the appellate response to that).

22. In that case, the Court of Appeal upheld a decision of Parker J for an immediate interim change in residence, with the judgment of McFarlane LJ setting out the salient paragraphs of the judgment of Parker J as follows:

> "74. I regard parental manipulation of children, of which I distressingly see an enormous amount, as exceptionally harmful. It distorts the relationship of the child not only with the parent but with the outside world. Children who are suborned into flouting court orders are given extremely damaging messages about the extent to which authority can be disregarded and given the impression that compliance with adult expectations is optional. Bearing in mind the documented history of this mother's inability to control these children, their relationship with one another and wholly inappropriate empowerment, it strikes me as highly damaging in this case. I am disappointed that the professionals in this case are unable truly to understand this message. The recent decision of the Court of Appeal, *Re M (Children)* [2013] EWCA Civ 1147 requires to be read by all practitioners in this field. Lady Justice Macur gave firm and clear guidance about the importance of contact. Parents who obstruct a relationship with the other parent are inflicting untold damage on their children and it is, in my view, about time that professionals truly understood this.
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> 75. I am in no doubt that I am entitled to disagree with the view of both the Guardian and the social worker, both of whom, although expressing their own views forcefully, recognise that the decision is for me, having surveyed all the facts and depending upon the findings that I make. I disagree with them because they have not taken into account the degree of parental manipulation and the dangers presented to the younger children from the inappropriate power given to the eldest boy. I am in no doubt that the mother's track record is such that she cannot safely have unsupervised contact to her two younger boys at the moment. Much though I would like to give these boys a Christmas as they want it, or as they believe they want it, it is unsafe for them to spend Christmas Day with their mother and her family. Quite apart from anything else, the mother accepts that the two younger children should spend Christmas with the father and his family. They should be told that that is now the parental agreed plan.
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> 76. I am in no doubt that the boys must remain living with their father until this case can be looked at again. I see no chance of any significant change to divert me from that view. I am not inclined to bring this matter back before the circuit judge in January, when I am away, unless there is some emergency which needs to be dealt with. There does need to be some form of further investigation. I am not at the moment persuaded, particularly because an expert of proper calibre has not been identified, that there needs to be any form of

> psychological assessment. That simply detracts from the judicial role and, after all, it is not experts who make findings and decisions; it is the Court. I would like to see how things settle down."

23. And, in deciding not to interfere with that decision, the Court of Appeal held (per McFarlane LJ at para [45]):

> "An immediate change of the primary residence of children during the course of ongoing court proceedings, where further assessment has been ordered, must be supported by evidence which establishes that such an interventionist step is proportionate to the need to safeguard the children's welfare on an interim basis. I am satisfied that the judge approached her decision on that basis."

The law – where we are now

24. The Court of Appeal decision last August in ***Re F (International Relocation Cases)*** [2015] EWCA Civ 882 is one with implications far wider than the field of external relocation.

25. Its explicit championing of the "holistic approach to the court's welfare analysis" is one equally pertinent to this scenario, and one which, in many respects, fleshes out the careful welfare checklist analysis that Peter Jackson J advocated in ***Re M***.

26. As to what that actually entails, there is, at para [29] of the judgment of Ryder LJ, express approval of what McFarlane LJ had said in ***Re G (Care Proceedings: Welfare Evaluation)*** [2013] EWCA Civ 965, [2014] 1 FLR 670 and of the President's subsequent words of approval in ***Re B-S (Children)*** [2013] EWCA Civ 1146, [2014] 1 FLR 1935:

> "What is required is a balancing exercise in which each option is evaluated to the degree of detail necessary to analyse and weigh its own internal positives and negatives and each option is then compared, side by side, against the competing option or options."
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> …

> "We emphasise the words 'global, holistic evaluation'. This point is crucial. The judicial task is to evaluate all the options, undertaking a global, holistic and ... multi-faceted evaluation of the child's welfare which takes into account all the negatives and the positives, all the pros and cons, of each option."

27. Thus, the proper and correct legal answer to the question posed at the outset of this talk is that change of care will be countenanced by the court when its global, holistic welfare evaluation (as explained above) determines that the change of care option, with all its consequences, better meets the welfare of the child than preserving the existing status quo in all its respects.

28. The old dicta that spoke of change of care being a "judicial weapon of last resort" can no longer be considered sound, but the shift in approach, it is suggested, does not just end there.

29. This talk has focused on – what might now be termed – the classic transfer of care case arising by reason of the failure or inability of one parent to support the child-parent relationship of the other parent, whether that manifests itself in the manipulation of the child or the making of false allegations or both.

30. The law has always recognised that a transfer of care may be appropriate (and not as an option of last resort) in cases where the child has suffered or is likely to suffer physical, sexual or even emotional harm, especially where such is significant.

31. What has changed (or at least appears to be changing) in judicial approach is the genuine recognition that the so-called classic case is not a species of case different from that but actually a subset of it – that, to

repeat the stark words of Parker J, "parental manipulation of children" is "exceptionally harmful", that "parents who obstruct a relationship with the other parent are inflicting untold damage on their children" – an insight which inevitably bears upon the court's consideration and weighting of "harm" as part of its balanced welfare evaluation. And it is probably that factor more than any other which is bringing about a judicial approach that in general terms can be properly described as more robust and proactive.

Practical steps

32. Flowing from the above, it is very important, if representing a parent facing child manipulation and/or false allegations, first to recognise and identify what kind of case this is, because time is of the essence, and secondly to set up the case from the outset in a way consistent with that analysis, with the following basic principles suggested:
    (a) that it is important for the emotional well-being of a child, absent issues of harm, to have a full and meaningful relationship with both their parents;
    (b) that accordingly it is the duty of each parent to support and promote the relationship between the child and the other parent;
    (c) that it is potentially emotionally harmful to the child if that full and meaningful relationship is denied or obstructed;
    (d) that, if that denial and/or obstruction persist over time, that child runs the risk of suffering significant emotional harm;
    (e) that, as the making of false allegations against a parent is one potent way of trying to deny or obstruct that relationship, the making of such is emotionally abusive, especially if the child is exposed to or drawn into those allegations;
    (f) that coaching a child is emotionally harmful;

(g) that making (or seeking to make) a child believe in something that is not true is emotionally harmful, especially if that involves the child being told that an important figure in their lives does not love or poses a risk to them;

(h) that exposing the child to negative views about the other parent, especially extreme views, is emotionally harmful to the child; and

(i) that (to quote again those words of Parker J), "parental manipulation of children [is] exceptionally harmful. It distorts the relationship of the child not only with the parent but with the outside world".

33. Where contact orders are being disobeyed for no good reason, then the breaches cannot be overlooked but rather need to be dealt with quickly and firmly; accordingly returning the case to court promptly should always be considered.

34. In the more overt cases, pushing for an early fact-finding hearing should always be considered, so that the parental manipulation and false allegations can be flushed out before they dictate the outcome. And, if that hearing goes the way you want, then, unless you have a tribunal prepared to act with the robustness and proactivity as Keehan J or Parker J, then the next two steps are to pin down the reaction of the parent in the wrong to the fact-finding judgment and to do what you can to ensure that their reaction, taken together with the findings form part of the risk/welfare assessment in the case.

35. For the purposes of that assessment, consider whether expert evidence ought to be obtained, but be prepared in the current climate for your court not to consider it "necessary".

36. And, when it comes to your final outcome hearing, bear in mind the option of the 'conditional residence order' (discussed in ***Re M*** above), as your tribunal, if cautious, may be more prepared to countenance that step than at that stage going the full way of a transfer of care.

37. Writ large through those observations is the importance of getting the right tribunal and ensuring continuity of tribunal.

38. So what then are the main obstacles to that approach and what might be the solution? By way of final thoughts, the three A's:
    - allocation;
    - administration;
    - arbitration.

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