Neutral Citation Number: [2012] EWCA Civ 285

Case No: B4/2011/2326

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ROYAL COURTS OF JUSTICE
(HIS HONOUR JUDGE JENKINS (SITTING AS A JUDGE OF THE HIGH COURT))
CASE NUMBER FD10PO2567

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/03/2012

Before:

LORD JUSTICE THORPE
LADY JUSTICE BLACK
and
SIR JOHN CHADWICK

- -

Between:

A	**Appellant**
B and C	**Respondents**

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- -

Alex Verdan QC and Charles Hale (instructed by **Kingsley Napley LLP**) for the **Appellant**
Charles Howard QC and Madeleine Reardon (instructed by **Hughes Fowler Carruthers Ltd**) for the **respondents**

Hearing date: 3 February 2012

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APPROVED JUDGMENT

LORD JUSTICE THORPE :

The Parties

The background

1. This appeal is brought with permission granted by My Lady, Black LJ. In her observation in granting permission on the papers she wrote that the case raises "important issues relating to the courts' approach to children born into 'alternative families' and the relationship of such children with their fathers". The appellant is A who is the biological father of the only child with whom we are concerned, namely M born on the 17th September 2009.

2. The Respondents are B, M's biological mother, and C who is B's long term lesbian partner. They are professional women of considerable achievement. M is cared for in their household by a full time nanny. A's spacious house is not far distant. The relevant facts are unusual if not unique. The three adults in the case are all homosexual and old friends. When B and C wanted a child they were naturally delighted when A offered to be a sperm donor.

3. B, who comes from a religious family, has had difficulties in achieving its acceptance of her sexual orientation. To alleviate further difficulties that would ensue from conception and birth B and A married on the 7th July 2007. The object of the marriage was to create a seemingly conventional family into which a child might be born. However, the couple had no intention of co-habiting and it was always intended that any child should be born into the household of B and C. They would be the primary care givers for any child and A, as the biological father, would be welcomed and acknowledged as such but otherwise his relationship with his son would be purely secondary. B and C were concerned that any greater role for A would encroach upon C's relationship with B and particularly the child. They worried about who would look after M if B were to die prematurely. They wanted that responsibility to rest with C.

4. There were of course discussions between the three adults which led to an understanding. The judgment which we review is the judgment of His Honour Judge Jenkins given on the 15th July 2011. He held that B and C were consistent in the expression of their proposals and wishes. He held that, whilst A may have had a different perception of his role, all parties believed that their respective positions were understood and agreed. They therefore proceeded optimistically on the venture.

5. Conception occurred in December 2008 which led, in the judge's words, "to cracks in the certainties that the parties had felt in optimism for the future." Increasingly formal and fraught discussions ensued. By April 2009 A was expressing his anticipation of overnight contact at his home once a week from birth augmented by an annual holiday.

6. M's birth did not dissolve these difficulties. On 10th November 2010 A applied for a defined contact order. On 19 November B and C responded with an application for a joint residence order and a specific issue order relating to A's exercise of parental responsibility.

7. There were interlocutory hearings before District Judge Cushing at the Principal Registry on the 13th December 2010 and on the 21st February 2011 before Mrs Justice Hogg.

8. Two points must be made on these interlocutory hearings. The first is that, at each, applications for the involvement of both CAFCASS and the well known expert, Dr Claire Sturge, were both refused. Secondly, Mrs Justice Hogg made an interim contact order extending A's time with M. This order was not appealed and at the final hearing before His Honour Judge Jenkins it was common ground that there should be a continuing contact order. The principal issue for the judge's determination was the frequency, nature and duration of the contact. Judge Jenkins heard evidence and submissions over the first four days of the week. He then delivered his extempore judgment on the following morning, Friday 15th July. Although he slightly increased the duration of A's contact hours he substantially upheld the case advanced by B and C that A's role in M's life should for any foreseeable future be secondary, enough for M to know who his father was but not so much as to fracture by frequent absence what is described as the nuclear family.

The outcome

9. The order of the 15th July by paragraph one granted a joint residence order to B and C. This was not in substantial dispute, although there are different views as to when it was conceded. It was of the utmost importance to B and C since it had the effect of conferring parental responsibility on C. Prior thereto, as a consequence of the marriage of convenience, parental responsibility had been confined to B and A.

10. Paragraph two set up A's contact, essentially one meeting a fortnight, the duration and the day of the week settled upon a six weekly cycle.

11. Applications for specific issue orders were either dismissed or not ordered.

12. The judge's conclusions were explained fully and skilfully and extended to some twenty pages. He made findings on the oral evidence of the three participants. Although he had no bespoke expert evidence he had the paper "Current Issues in Relation to Gay and Non-Biological Parenting" presented by Dr Claire Sturge at the 2007 Dartington Conferences published by Family Law under the title "Integrating Diversity" in 2008. He directed himself by citing relevant authority and then stated his conclusions. For the purposes of this review the critical paragraphs of his judgment are paragraphs 36 to 42 inclusive which I will cite in full:

> " 36. In turning to the way in which decisions should be made in this case, it seems to me that those observations are crucial. In this case in fact, first of all, the father, however much he may wish it, is the biological but not the psychological parent. Whatever the unusual nature of the relationships in this particular case, and I say "unusual" without criticism, the relationships between the parties in this case are, in my judgment, crucial. By agreement with the father, a child was conceived and born and on the basis of a relationship already created where the two mothers were to be the primary carers. The evidence is that they had prepared

over a long period for parenthood on that basis, and the evidence is that they have established a regime of security and stability. It is plain that all three parties failed to get to grips with the nature of the relationship. The father never managed to establish an agreement to his satisfaction and he failed in the end to appreciate the way in which the mothers had thought through the stability of the relationship in the way that I have described.

37. The situation that is referred to is not in any way analogous to a situation which has been referred to as the "divorce model". The father himself used the phrase at an early stage, seeing himself in the role of the separated parent but, in broad terms, in most cases where there is a separation between married or previously cohabiting parents a relationship has been established between the parent with whom the child is not living. The father, in my judgment, fails to appreciate the dynamics of causing a rift and break in the present relationship. The father has never lived with M and if he does get to a situation in contact where he does live with M that will make a significant alteration to the dynamics in which M has been successfully brought up for two years. There has never been an acceptance of the basics of the father's position, even if he made it plain, that there should be three parents and two homes. That is something that could be achieved possibly in a theoretical situation, but this is not that situation, and consideration of a contact regime appropriate to a divorce is inappropriate. The father has never lived with the child and unless the court orders it he is never likely to do so. In my judgment, that is crucial. Any benefit that might accrue from developing the relationship with the father to regular contact, shared holidays and a situation where in normal terms in these days a Shared Residence Order might be appropriate is not presenting this case. The father has done well with the child. That is his evidence and I accept it, but to try and develop the relationship to a full divorced parent type of relationship, in my judgment any benefit that accrues is likely to be outweighed by what I consider is likely to be confusion and disruption and the potential disruption of the relationship between the mothers and the child, and it is that relationship which provides the nurture, stability and security for M. That position is made more obvious by the particular anxieties which I have highlighted in this case, in particular the background of B and her family and the evidence establishes the particular stress and anxiety that the mothers feel and which goes beyond the question of litigation stress.

38. Therefore, fitting the matter into the welfare check list, it is plain that the father could in contact and in his relationship

provide for M's physical needs and educational needs. He can make a contribution towards dealing with M's emotional needs but a lengthy regime of contact, and regular and very frequent contact, puts M's emotional needs at risk, and would be a change of circumstances which would have a likely or very possible harmful effect on him, and put him at risk of suffering harm. In my judgment, I do not need to rehearse again the particular factors that I have identified, but that must govern those matters and must govern the court in relation to its approach to the matter.

39. The other crucial factor in the welfare check list at s.1 (3) of the Children Act 1989 is (g), as it very often is: "the range of powers available to the court under this Act in the proceedings in question". It is very sad that in many cases much time has been spent in discussing the appropriate labelling of any orders that the court might make. It is not directly on point but Lady Justice Black (as she had then become) deals with the matter in the case of *T v T*, and again I just want to refer to one short passage in that judgment, and it is at para.27.

> "What is profoundly disappointing is to see how, in practice, instead of bringing greater benefits for children, shared joint residence can simply serve as a battlefield for the adults in the children's lives, so that even when the practicalities of how child's time should be split are agreed or determined by the court they continue to fight over what label is to be put on the arrangement. This can never have been intended when shared/joint residence orders were commended by the courts as a useful tool."

That applies to all kinds of labelling in these matters. I will return to it specifically, that there is an agreement in this case or a parenting agreement that was put forward that refers to "parental responsibility", indicating that there should be some kind of sharing of parental responsibility, and it needs to be made plain that the Children Act, as the passage I have read in *Re B* from the House of Lords makes plain, the Children Act offers no rights, it only offers responsibilities.

In this case the parents have each agreed that the father has responsibility, he has parental responsibility, and I will come to the circumstances in which he might exercise it. But I mention parental responsibility in this context because individual responsibility is not something to be shared – although it might be in an individual transaction – as if it conveyed a right. It conveys a status, but the status is one of having responsibility.

40. It is plain, as I have said, that there needs to be joint residence orders to the mothers, because that is the way that AC acquires that parental responsibility, which will assist her in bringing up M, and she gave examples of the problems that she might have in circumstances where M was ill, for example, in B's absence when she could not, for example, access a doctor. It is quite plain that while the concept of joint residence goes beyond that it is an illustration of what is important about the matter. It also deals with the question of what would happen if one of the mothers, being the primary carers, died suddenly or was ill. It is plain that at that stage the surviving or well partner would have a residence order. It is important to achieve that.

41. So what is the position of the father so far as contact is concerned? It must be right for the father to have a relationship with the child. It must be right that there will be occasions when the father cares for the child on his own, and that the balance of that happening, so that M knows who his father is, would also develop, albeit a limited relationship with him, is appropriate in these circumstances. But to approve a regime under whatever label, as I have said, where the concept of three parents and two homes could be envisaged, is not indicated by the circumstances of this case. Therefore it seems to me that the court cannot, in the context of this case, and bearing in mind the threat that at M's age in particular what the mothers perceive in relation to the matter, there could not be contemplated any staying contact at this stage. The question of the balance could be put perhaps at the risk of the labelling that I have disapproved by saying that the order ought to involve more than identity contact but less than the type of contact which would lead to a Shared Residence Order, or indeed to any period of residence. Hogg J made an order for contact once a fortnight for five hours in each case. I think, for the reasons that I have given, that is in fact the appropriate regime, but I think that on a weekend the order ought to be slightly longer, and the difference between six hours and five hours is quite important for a child of two years or thereabouts in those circumstances.

42. Both parties have essentially invited the court to provide for the future, but it is not really possible to do so. There is the question of the power to vary for I do not see the basis for the staying contact changing very much in the near future. It may be that when M is three or four years of age a whole day in each of the contacts is appropriate. The contact should be on the basis of once a fortnight. At present there is a clear picture of the regime, and at present it is usually set five hours on Saturday. In any event, I think that on one of

the occasions it ought to be six hours and the other occasion five hours, and that is the decision I take."

Submissions

13. Mr Alex Verdan QC led Mr Charles Hale who appeared below. It was hard for him to show a short term deficit in the contact order made by the judge. After all it gave A a modest extension and his proposal had been for incremental advances which would lead to an attempt at staying contact in September 2011. His real complaint was of the judge's characterisation of A's future relationship with M as "a limited relationship" that had led the judge to observe "there could not be contemplated any staying contact at this stage". Those quotations are taken from paragraph 41 and extended in paragraph 42 with this "I do not see the basis for [the refusal of] staying contact changing very much in the near future". The very words of the judge in the second sentence of paragraph 42 are impossible to construe without the addition in square brackets which, it was generally agreed, catches the judge's intended sense.

14. Mr Verdan therefore characterises the judge's assessment as unfounded and unprincipled. Why is A to be confined to a limited relationship and why is that confinement of indefinite duration? Mr Verdan submits that the judge had frozen the contact arrangements for the foreseeable future when authority in principle pointed to the normal developmental path with steady increases in frequency and duration to achieve staying contact and beyond that holiday contact.

15. In response Mr Howard QC points out that there was no objection to contact in principle and the only issue for the judge was to fix the quantum of contact in the immediate future. Where quantum alone is in issue this court should be particularly slow to interfere with the discretion of the trial judge, particularly where he has heard oral evidence over the course of some four days.

16. Secondly, Mr Howard emphasises that Mr Verdan has sought to apply to a homosexual couple who have created a nuclear family principles which apply in the generality of cases where a heterosexual couple separate and the court rules on the quantum of contact to the parent who is not exercising primary care.

17. Mr Howard relied strongly on the views of Dr Sturge in the publication cited above and on the following line of authority commencing with the decisions of My Lady, Black LJ, in the case of *Re D*, first in 2001, and then in 2006.

    see *Re D* (contact and parental responsibility: lesbian mothers and known father) 2006 1FCR 556: then:-

    Re B (role of biological father) 2008 1 FLR 1015.

    R v E and F (female parents: known father) 2010 2 FLR 383.

    ML and AR v RWB and SWB (2012) Fam Law 13 (judgment on a fact finding hearing in July 2011).

    Re P and L (2011) EWHC 343 1 (the outcome hearing in December 2011 as yet unreported).

18. The last two citations post date the judgment below but support the general approach advocated by Mr Howard. Mr Howard stressed the judge's assessment of the stresses that were experienced by the nuclear family and the judge's finding that the maintenance or increase of such stresses risks harm to M.

19. Mr Howard stressed the importance of the autonomous decisions of B and C to create a family of their choice. If those decisions were not respected and supported the number of people opting for known donor sperm might be reduced. Additionally Mr Howard asserted the great importance of agreements reached between the three adults in these situations. He almost suggested that an agreement should rank with child welfare in the court's judgment.

Conclusions

20. As My Lord, Sir John Chadwick, pointed out early in Mr Verdan's submissions, the appeal is essentially directed to the judgment rather than to the resulting order. There is not a single paragraph in the order that can be challenged. They simply express legitimate exercises of the judicial discretion. It is the judge's conclusions as to the bounds of the future relationship between A and M that Mr Verdan urges us to reject. Of course they find no expression in the order. To meet this point Mr Verdan suggested that he was entitled to attack the contact order in that it did not provide for staying contact. However, in reality the application was for immediate contact, much as ordered, with a progression towards staying contact.

21. Of course the judge's observations in paragraphs 41 and 42, finding no expression in the order, would not bind a judge hearing a future application for increased contact. However, they would be heavily relied upon by any respondent who would emphasise that they were the product of four days of oral evidence. Clearly they would be prejudicial to the success of such a future application.

22. There are many cases in which a judge feels that a present order should remain unchanged for the future in order to protect the child from the risk of direct or indirect harm. The judge's power to restrict a future application rests in s.91(14) of the Children Act 1989. In making such an order the judge should ordinarily set the duration and the extent of the prohibition. Such a specific order is then open to appellate review. The effect of paragraphs 41 and 42 is tantamount to a prohibition on an application for staying contact for a period of three to four years without the court's permission. Had there been such a paragraph in the order of 15th July the appellant's appeal would have been more concise.

23. What is the foundation for the judge's conclusions expressed in paragraphs 41 and 42? Plainly he has drawn, from Dr Sturge's paper and the line of authority which I have cited, a yardstick which he has then applied as a general rule which must apply to all disputes between two female parents and the identified male parent. In my judgment that is a fundamental error since all cases are so fact specific. In the end the only principle is the paramountcy of child welfare.

24. Whilst I have every sympathy with the judge who extracted this general rule from a careful appraisal of the material before him, there are many facets of the present case which were not brought into the balance, perhaps because the judge concluded that they were excluded by the general rule. A's involvement in the creation of M and his

commitment to M from birth suggest that he may be seeking to offer a relationship of considerable value. It is generally accepted that a child gains by having two parents. It does not follow from that that the addition of a third is necessarily disadvantageous.

25. This was an important case and a difficult one. The trial judge deserved the enlightenment that expert evidence provides. In my opinion it is unfortunate that the interlocutory applications were refused. Dr Sturge is an eminent expert but there may be others who have specialised in these difficult cases. Furthermore, a published paper is no substitute for a bespoke report that considers the all important facts specific to the case. We do not know whether the views expressed by Dr Sturge in 2007 have evolved in reaction to additional research and findings.

26. I also wonder whether consideration should not have been given to joining M as party to the proceedings to ensure that adult concerns and considerations did not dominate the debate. M's welfare was the judge's paramount concern but he would surely have been assisted had the child's welfare been evaluated and advocated by an experienced team.

27. I am cautious in reaction to Mr Howard's repeated submissions that great weight should be attached to adult autonomy and the plans that adults make for future relationships between the child and the relevant adults. Human emotions are powerful and inconstant. What the adults look forward to before undertaking the hazards of conception, birth and the first experience of parenting may prove to be illusion or fantasy. B and C may have had the desire to create a two parent lesbian nuclear family completely intact and free from fracture resulting from contact with the third parent. But such desires may be essentially selfish and may later insufficiently weigh the welfare and developing rights of the child that they have created. No doubt they saw the advantages of A as first an ideal known father and later as a husband to ease problems in the maternal extended family. It would have been naïve not to foresee that the long term consequences held disadvantages that had to be balanced against the immediate advantages.

28. Of the authorities cited, I wish only to consider the two judgments of Hedley J cited above and post-dating the judgment in the present case. In both judgments he sought to formulate a new categorisation in these difficult cases. In the earlier judgment he said:

> "I have tried hard to see whether there are any other concepts than that of mother, father and primary carer, all conventional concepts in conventional family cases. The best I have achieved and I confess to having found it helpful in thinking about the case is to contemplate the concept of principal and secondary parenting…"

29. In his later judgment he returned to the point saying:

> "I appreciate that in a case like this we are in what is still new territory in defining the roles of the various parties in the context of parenting. I have tried to develop the concept of principal and secondary parents since for the reasons explained conventional roles provide unreliable models.

> Accordingly the only guidance that I feel able to give is threefold: first to stress the importance of agreeing the future roles of the parties before the child is born; secondly to warn against the use of stereotypes from traditional family models…and thirdly to provide a level of contact whose primary purpose is to reflect the role that either has been agreed or has been discerned from the conduct of the parties…"

30. I would not endorse the concept of principal and secondary parents. It has the danger of demeaning the known donor and in some cases they may have an important role. In the present case some would say that the primary carer is the full-time nanny. However, let me rank the three parents in the context of care. Clearly, B and C are primary carers. Clearly, A is only presently on the threshold of providing secondary care. Whether and when he should cross that threshold is the question which is likely to be decided by a judge in the future. But I would certainly not categorise him as a secondary parent.

31. Although I understand the sense in which Hedley J defined the primary purpose of contact as being to reflect the role agreed or discerned from conduct, we must never forget that the primary purpose of such contact is to promote the welfare of the child.

32. In my judgment the conclusion that Judge Jenkins should have reached was that the issue of whether the relationship between M and A should be encouraged to thrive and develop had to be decided by stages in the light of accumulating evidence. There were too many unforeseeable factors to allow this judge to declare the future as definitively as he did.

33. Accordingly, I would allow this appeal and remit to a Family Division judge the consideration of all factors relevant to the welfare balance. Such a hearing would probably not be listed until nearly a year on and the judge will have the opportunity to assess the immediate future in the light of the immediate past. How has the present regime operated? Has the stress within the family of the two mothers moderated as a result of C's recognition as a parent with parental responsibility?

34. On these and other issues I consider that the judge is entitled to more assistance than was available to Judge Jenkins, whether by way of expert reports, welfare reports or separate representation.

35. Finally, given that there may be a need for an independent expert arbitrator for many years to come, the advantages of judicial continuity should be achieved by allocating the case to a recently appointed judge of the division to whom the case can thereafter be reserved.

Black LJ:

36. I have had the advantage of reading the judgment of My Lord, Thorpe LJ, in draft and agree with much of what he says including his proposed determination of this appeal.

37. It is only because I am conscious of how difficult cases such as this can be for a trial judge that I propose to contribute a short judgment of my own. It is over a decade since in 2001 I first rather tentatively considered (in *Re M (Sperm Donor Father)* [2003] Fam Law 94) how best to approach issues over contact and parental responsibility for a child conceived by one of a lesbian couple and a man who became known to them when they advertised for someone to father a child for them. I was acutely aware then of the lack of guidance as to how such a situation should be approached and what arrangements would be likely to be in the best interests of the child. I returned to the case in 2006 (*Re D (contact and parental responsibility: lesbian mothers and known father)* [2006] 1 FCR 556) at a time of considerable change in the law affecting same sex couples with the coming of the Civil Partnership Act 2004, the decision of the Court of Appeal in *Re G (residence: same sex partner)* [2005] EWCA Civ 462, [2006] 1 FCR 436, and the provisions of the Adoption and Children Act 2002 permitting adoption by a same sex couple. I observed that new ways of family life were evolving but had not yet crystallised and that there was not even the language to accommodate them. As I said at §34 of *Re D*, I had to adjudicate upon the issue of parental responsibility for the biological father equipped only with concepts and language which were not designed to cater for the situation I had before me.

38. Despite the passage of time, the courts continue to struggle to evolve a principled approach to cases such as this one. Hedley J observed in *ML and AR v RWB and SWB* [2011] EWHC 3431 (Fam) that this is "still new territory" where conventional models would not work and "a distinct concept of parenting and parental roles" is necessary. Asked for more general guidance, he wisely limited what he was prepared to say, conscious that giving guidance was "fraught with risk". He acknowledged in particular that there are "really no restraints on what parties can choose to agree should be their respective roles".

39. I have no doubt that it would be seen as helpful if this court could lay down the sort of guidance that Hedley J declined to give and it was partly with this in mind that I gave permission for this appeal. However, after much consideration, I have concluded that this is an area of family law in which generalised guidance is not possible. As Thorpe LJ says at §23, all cases are so fact specific. The immutable principle is that the child's welfare shall be the court's paramount consideration in determining issues such as residence, contact and parental responsibility. Section 1(3) Children Act 1989 provides a useful framework for identifying the sort of factors that will bear upon each decision. In the present case, the judge made a considerable number of findings which would fit conveniently under the section 1(3) headings, as well as other findings which are part of the wider circumstances of the case. I will pick some out by way of example.

40. In relation to A, the judge noted:

    i) his participation in the early stages, including being present at the hospital when M was born and at his christening and his participation in the early plans for his education

ii) his ability to care for M well physically

iii) his love for M, his pleasure in relating to him, and his wish to develop his relationship with him and to play a full part in his development

iv) his support of C in her difficulties in her relationship with B's family.

41. In relation to B and C, he noted that:

i) they provide M's "nurture, stability and security"

ii) they feel particular stress and anxiety, going beyond litigation stress

iii) they perceive a threat of C being marginalised (historically because of B's family's reactions but more generally too) and that generates considerable fear about C's position as a carer of M, particularly if B were to die; this is "aggravated by these applications [to court] and by uncertainty about what will happen, but I am not clear that any decision that is made will necessarily make those fears go away"

iv) they regard A's aspirations for his relationship with M as disturbing "the vision that they have of being a core family in which they will provide M with a secure and loving home" and threatening severe damage to their relationship

v) they wish to have more children, this time by an unknown donor, which will complicate matters and change the dynamics of the family.

42. In relation to the agreement between the parties to conceive a child together and in relation to the marriage of A and B, he noted that:

i) it was accepted on both sides that the marriage of A and B was one of convenience to mollify B's family who would have objected to her having a child out of wedlock, though it in fact resulted in A having parental responsibility for M

ii) B and C never departed in the discussions which took place prior to conception from their "core position about a core family unit in which they would be the primary carers"

iii) it was made plain that the child would make his home with them as the primary carers and they would make arrangements for his care and future but they indicated that they would consult A about important issues such as education, health, and religion

iv) A wanted some assurances about his status in relation to the child when it was born but he conceded that he never got any though B and C may have encouraged A to a different view of what the future might be and A heard what he wanted to hear at times

v) the contemplation was that A would join in naturally at family events and on special occasions

vi) an assurance was given that M would be able to visit paternal family and friends abroad

vii) the "cracks in the certainties" felt by the parties had appeared before M was born and there were already disagreements about what should happen, for example about staying contact

viii) there developed "a high level of misunderstanding and eventually rancour" after M's birth.

43. I have listed these various findings in order to illustrate the wide ranging nature of the judge's careful investigation of the case. All the facts that he found had a potential relevance to his decision about contact. In singling some out for further discussion, I do not wish to be thought to be suggesting that those factors have any greater intrinsic weight in future cases than any others. How influential any particular factor is depends upon the particular circumstances of the case under consideration.

44. The adults' pre-conception intentions were relevant factors in this case but they neither could nor should be determinative. What happened here shows graphically how plans change over time. Plainly it is sensible for people who are intending to enter into an arrangement such as this one to consider and spell out in as much detail as they can what they contemplate will be the arrangements for the care and upbringing of their child. But no matter how detailed their agreement, no matter what formalities they adopt, this is not a dry legal contract. Biology, human nature and the hand of fate are liable to undermine it and to confound their expectations. Circumstances change and adjustments must be made. And above all, what must dictate is the welfare of the child and not the interests of the adults.

45. It is likely to be important, in deciding what is in the child's best interests to identify, as the judge did, the source of the child's nurture, stability and security. In some cases it will be derived predominantly from the family in the position of B and C but in other cases the child may be used to being cared for by an amalgam of that family and the other parent – the "three parents and two homes" regime to which the judge referred in his §41. Disruptions to that security and stability, even if arising indirectly because one of the adults is distressed, will be relevant as potentially harmful to the child. Sometimes potential disruption will come from one of the parties to the proceedings, sometimes anxiety will be generated from outside, as where there is apprehension about society's response to the child's family arrangements (as there was here in the very early days in relation to M's school) or pressures from other family members (as in the case of B's family).

46. Particular consideration will also have to be given to the part that each adult can play in the child's life. M's emotional need for B was probably self evident on the facts of this case but the judge also recognised C's importance in the equation and the part that A had to play.

47. Consideration also needs to be given to whether there are orders available that may assist in addressing particular difficulties. Both in this case and in *T v T*

(Joint Residence) [2010] EWCA Civ 1366 [2011] 1 FCR 267 a shared residence order was made in order to try to alleviate anxiety about arrangements should the biological mother die. By addressing such anxieties, and making the adults feel more secure, it may be possible to create a climate which in time will accommodate more generous contact than might otherwise be feasible.

48. There is one final thought that I would like to air. The practice has grown up of referring to the father in circumstances such as this as a "donor". That is entirely understandable where he has made an anonymous donation of sperm. However, it seems to me that the label might merit reconsideration in other cases as it is capable of conveying the impression that the father is giving his child away and that is misleading. As I hope I have explained, the role of the father in the child's life will depend on what is in the child's best interests at each stage of the child's childhood and adolescence. As with any other child, the father/child relationship may turn out to be close and fulfilling for both sides, it may be no more than nominal, or it may be something in between.

Sir John Chadwick

49. I agree.