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# A v B and C [2012]

## [2012] EWCA Civ 285

14/03/2012

**Barristers**
Alex Verdan KC
Charles Hale KC

**Court**
Court of Appeal

**Practice Areas**
Private Children Law

**Summary**
Appeal by biological father of child residing with the biological mother and her lesbian partner concerning contact arrangements in respect of the child. Appeal allowed and case remitted to a Family Division judge.
To download a copy of the full judgment click here

**Facts**
This appeal concerned contact arrangements in respect of a child, M. The appellant was A, M's homosexual biological father. B, M's biological mother and C, B's long term lesbian partner, were the respondents. Black LJ, in granting permission to appeal observed that this case raised "important issues relating to the courts' approach to children born into 'alternative families' and the relationship of such children with their fathers".

B and C wanted to have a child. A, an old friend, offered himself as a sperm donor. B's family had difficulties accepting her sexual orientation and, to minimise any resultant friction, B married A in 2007. There was never any intention of co-habitation. The intention was that: (1) any child should be born into the household of B and C; (2) B and C would be the primary care givers for any child; and (3) 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.

In December 2008, conception occurred. The parties began to have increasingly fraught discussions about the contact arrangements for the future child, M's ultimate birth not resolving these. In November 2010, A applied for a defined contact order and B and C responded with an application for both a joint residence order and a specific issue order relating to A's exercise of parental responsibility.

Interlocutory hearings occurred in late 2010/early 2011. At each hearing, applications for the

involvement of both CAFCASS and the well known expert, Dr Claire Sturge were refused. An interim contact order was made extending A's time with M.

The final hearing came before HHJ Jenkins. He slightly increased A's contact hours but substantially upheld B and C's case. This was 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 the 'nuclear family'. His order granted a joint residence order to B and C and set up A's contact, essentially one meeting a fortnight, the duration and the day of the week settled upon a six weekly cycle. A appealed.

## Held

The appeal was unanimously allowed and the case was remitted to a Family Division judge to consider all the factors relevant to the welfare balance. Thorpe LJ gave the lead judgment, with Black LJ offering an additional shorter judgment. Sir John Chadwick agreed with both.

Thorpe LJ noted that there was not a single paragraph in the order that could be challenged. The order expressed the legitimate exercises of the judicial discretion.

In many instances, a judge could feel that a present order should remain unchanged for the future to protect the child from the risk of harm. Such power to restrict a future application rested in s.91(14) Children Act 1989. Judges should ordinarily set the duration and the extent of the prohibition when making such an order. Such specific orders were then open to appellate review.

The effect of HHJ Jenkins's reasoning was tantamount to a prohibition on an application for staying contact for a period of three to four years without the court's permission. The Judge should have reached a conclusion 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.

All cases were fact specific, with the only principle being that of the paramountcy of the child's welfare. A fundamental error in the Judge's approach was – drawing on a paper by Dr Sturge and a line of authority including Re D (contact and parental responsibility; lesbian mothers and known father) 2006 1 FCR 556, Re B (role of biological father) 2008 1 FLR 1015 and Hedley J's judgments in both ML and AR v RWB and SWB (2012) Fam Law 13 (judgment on fact finding hearing in July 2011) and Re P and L (contact) [2011] EWHC 3431 (Fam) – to extract a yardstick which he then applied as a general rule which had to apply to all disputes between two female parents and the identified male parent.

Many facets of the case were not brought into the balance, perhaps due to the conclusion that they were excluded by the general rule. A's involvement in the creation of M and his commitment to M from birth suggested he might be seeking to offer a valuable relationship. It was generally accepted that a child gained by having two parents. It did not follow that the addition of a third was necessarily disadvantageous.

Hedley J, in both his above mentioned cases, sought to formulate a new categorisation in difficult cases such as these and had attempted to develop the concept of principal and secondary parents. This concept was not endorsed. It had the danger of demeaning the known donor, where, in some cases they might have an important role. Whilst it was understandable that Hedley J defined the primary purpose of contact as being to reflect the role agreed or discerned from conduct, the primary purpose of such contact was to promote the welfare of the child. Whilst B and C were clearly the primary carers and A was only on the threshold of providing secondary care, he should not be classed as a secondary parent as whether he should cross that threshold was likely to be decided by a judge in the future.

Black LJ acknowledged the lack of concrete guidance on how to approach the issues in cases like this.

The courts had continued to struggle to evolve a principled approach to them. Whilst Hedley J in ML and AR observed that this was “still new territory” where conventional models would not work and a “distinct concept of parenting and parental roles” was necessary, he refrained from giving general guidance.

This was an area of family law in which cases were fact specific and generalised guidance was not possible. The immutable principle was that the child’s welfare should be the court’s paramount consideration in determining issues such as residence, contact and parental responsibility. Section 1(3) of the Children Act 1989 provided a useful framework for identifying the sort of factors that would bear upon each decision. How influential any particular factor was depended upon the particular circumstances of the case.

In deciding what was in the child’s best interests, it was likely to be important to identify the source of the child’s nurture, stability and security. In some cases it would be derived predominantly from the family in the position of B and C, but in others the child may be used to being cared for by an amalgam of that family and the other parent. Disruptions to that security and stability would be relevant as potentially harmful to the child.

Particular consideration would also have to be given to the part that each adult could play in the child’s life. M’s emotional need for B was probably self evident on the facts but the Judge also recognised C’s importance in the equation, and the part that A had to play.

Consideration also needed to be given to whether there were orders available that might assist in addressing particular difficulties. In both 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 making the adults feel more secure in this way, a climate could be created which, in time, would accommodate more generous contact than otherwise might be feasible.

A practice had grown up of referring to fathers in circumstances such as this as a “donor”. This was understandable where an anonymous sperm donation was made, but the label might merit reconsideration in other cases as it was capable of conveying the impression that the father was giving his child away. This was misleading. The role of the father in the child’s life will depend on what was in the child’s best interests at each stage of its childhood and adolescence.