

RE H (PARENTAL RESPONSIBILITY: MAINTENANCE)

[1996] 1 FLR 867

Court of Appeal
Leggatt LJ and Douglas Brown J

21 February 1996

Parental responsibility — Father not paying child maintenance — Father's application for parental responsibility — Whether application to be adjourned for father to demonstrate financial commitment to children

The father applied for parental responsibility and contact to his two children. Contact orders were made in 1993 and reaffirmed in 1995. At the hearing in 1995 the judge adjourned the father's application for parental responsibility to enable the father to demonstrate his commitment to the children by assisting in their financial upkeep.

Held – allowing the appeal – the judge was rightly critical of the father for not providing financially for his children, but placed undue emphasis on the father's obstinate refusal to pay maintenance (p 872E). The court should not use the weapon of withholding a parental responsibility order to obtain from the father his financial dues. When a father showed some devotion to his children he should ordinarily be granted a parental responsibility order. Orders relating to the upbringing of children should be made without delay (p 872A).

Statutory provisions considered [top](#)

Children Act 1989, ss 1(2), 3, 4(1)

Case referred to in judgment [top](#)

S (Parental Responsibility), Re [\[1995\] 2 FLR 648](#), CA

Cases cited but not referred to in argument [top](#)

C (Minors) (Parental Rights), Re [\[1992\] 1 FLR 1](#), [\[1992\] 2 All ER 86](#), CA

D v Hereford and Worcester County Council [\[1991\] Fam 14](#), [\[1991\] 1 FLR 205](#), [\[1991\] 2 WLR 753](#), [\[1991\] 2 All ER 177](#), FD

E (Parental Responsibility: Blood Tests), Re [\[1995\] 1 FLR 392](#), CA

G (A Minor) (Parental Responsibility Order), Re [\[1994\] 1 FLR 504](#), CA

H (A Minor) (Parental Responsibility), Re [\[1993\] 1 FLR 484](#), CA

H (Minors) (Local Authority: Parental Rights) (No 3), Re [\[1991\] Fam 151](#), [\[1991\] 2 WLR 763](#), sub nom *H (Illegitimate Children: Father: Parental Rights) (No 2)*, *Re* [\[1991\] 1 FLR 214](#), sub nom *H and Another (Minors) (Adoption: Putative Father's Rights) (No 3)*, *Re* [\[1991\] 2 All ER 185](#), CA

P (A Minor) (Parental Responsibility Order), Re [\[1994\] 1 FLR 578](#), FD

T (A Minor) (Parental Responsibility: Contact), Re [\[1993\] 2 FLR 450](#), CA

Camille Habboo for the father

Joy Pinkham for the mother

LEGGATT LJ:

Mr B appeals against so much of the order of Judge Catlin made at Milton Keynes County Court on 23 August 1995 as ordered that Mr B's application for parental responsibility orders in respect of two children named C and G should be adjourned so as to enable Mr B, to whom I shall refer as

'the father', to demonstrate his commitment to those children by assisting in their financial upkeep. It should be said that the elder child C is now 7½ whilst G is 4.

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The father began his relationship with the mother, now called RG, in October 1986. In consequence of it, C was born in 1988. In the meantime, it seems that the father had taken up with another woman called MS with whom he is now living. The mother and father separated in June 1990, but from then until the end of the following year the father maintained his contact with C and with her older half-sister E. In February 1991 there was a brief reconciliation between father and mother during which G was conceived. It seems that that contact between the father and the children was terminated by the mother shortly after G was born. So it was that in February 1992 the father made applications for a parental responsibility order and for contact in relation to C and for contact with E. Some contact ensued between then and June 1993.

Meanwhile, at the end of 1992 paternity tests showed that the father was indeed the father of G. In consequence, in November 1992 he applied for a parental responsibility order and for contact with G. A contact order in relation to C and G was made on 10 June 1993. That contact was, however, terminated nearly a year later by the mother who, in August 1994, married Mr G. In September 1994 the father applied to vary the contact orders that had been made in June 1993. Thus it was that on 23 August 1995, as I have indicated, the judge reaffirmed the contact orders but stood over the application for parental responsibility orders.

In his judgment the judge set out the facts in some detail and considered the question of contact, remarking in his judgment:

'His failure to pay maintenance of any sort for either child does him no credit.'

The judge asserted that the father had no excuse for failing to maintain his children, because although there might have been times when he had not been in full employment, on his own evidence he had been in full employment and yet not a penny had been sent to the mother for the maintenance of the children. It was obvious, as the judge commented, that they had to be housed and clothed and fed by somebody. The judge understandably gave nothing for the father's excuse that he was not making any payments because the mother would spend the money on herself for cigarettes and drink. The judge said that that remark was completely without justification.

The judge recorded that the father had, however, provided clothing for the children, and that he had been deprived of contact notwithstanding the order in his favour for a period of over a year. Although he had questioned G's paternity in the first instance, following the test that I have mentioned he accepted that he is G's father and that is why the orders that he sought included G as well as C. The judge deprecated the mother's complaint that the father was accusing her of blackmail and of bludgeoning him into agreement. Those expressions he regarded as wholly inappropriate. That the mother was opposing contact between the children and the father was not attractive, but the judge, on the other hand, found the mother to be entirely genuine and honest and merely motivated by what she perceived to be in her children's interests so as to maintain a happy family unit untroubled by the intrusion of the father. The judge recorded that she had, however, managed to suppress her feelings from her children and that she had done her best to

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make contact work. He was evidently referring to those occasions upon which she had permitted contact. The mother was worried about the unjustifiable late return of the children from the contact visits. The judge found that she was justifiably upset by the contempt shown to her by the father. He summarised the position by saying:

'Whilst I accept the mother's evidence that there has been unjustified failure by the father to keep to times, he has never missed contact, he has tried to pursue it after it was stopped and in my

judgment the probability is that if an order is made he will in future keep to the times laid down by the court or reached by agreement.

In my judgment this mother, in arriving at her decision to stop contact, has considered the short-term needs of herself and husband and not the long-term needs of her children which I have referred to.'

He emphasised that he was not criticising her in that respect. He declared – and there is no appeal from this part of the order – that her 'children's emotional needs long term are that they should have contact with their father in the short, medium and long term'. He said:

'There are no cogent or convincing reasons to deprive the children of that right.'

When he turned to consider parental responsibility orders, the judge said:

'... I am not satisfied as to the degree of commitment shown by this father in relation to maintenance of either child. I am satisfied that his application is entirely genuinely motivated and that there is an existing attachment of varying degrees to both children. The court welfare officer recommends that this is a suitable case for a parental responsibility order. I do not agree with her recommendations in that respect, and I have to say why. My view is the father's total failure (for which there is some excuse or some reason) in my view is not showing the sort of commitment one would expect to see to justify a parental responsibility order.'

The judge added:

'In my judgment the father ought to be given an opportunity to demonstrate that he is fully committed to these children, not only because he wants to see them but because he wants to assist in their financial upkeep. Whilst I appreciate that matters in relation to children should not be held over indefinitely, it does seem to me that the appropriate course here is to give this father an opportunity to demonstrate that he is fully committed to the children by either agreeing with the mother and/or her representatives an order for periodical payments, which can be endorsed by the court if there is agreement and it is a proper amount or by complying with an assessment from the Child Support Agency.'

He therefore made the order that I have indicated.

We have been told by Mrs Pinkham, who appears in this court for the mother, as she did before the judge, that the Child Support Agency is

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pursuing the question of maintenance and taking its own proceedings against the father now that he has been located, in order to secure the maintenance that is due from him for the children.

It is helpful to have in mind the salient provisions of the Children Act 1989. They are these, so far as material. Section 1 provides:

'(1) When a court determines any question with respect to—

(a) the upbringing of a child; ...

the child's welfare shall be the court's paramount consideration.

(2) In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.'

Section 3(1) defines parental responsibility, saying:

'In this Act "parental responsibility" means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.'

By s 3(4) it is provided that:

‘The fact that a person has, or does not have, parental responsibility for a child shall not affect—
(a) any obligation which he may have in relation to the child (such as a statutory duty to maintain the child); ...’

Finally, by s 4(1) it is provided, so far as material:

‘Where a child's father and mother were not married to each other at the time of his birth—

(a) the court may, on the application of the father, order that he shall have parental responsibility for the child; ...’

Resisting this appeal, Mrs Pinkham has urged us to the view that the judge made the right decision having seen the parties giving evidence. She remarks that he did not shut the door upon the father. In support of the appeal Miss Habboo has objected that the order for parental responsibility should have been made notwithstanding the father's failure to pay maintenance, because the application was genuinely made in consequence of an attachment for the children, of which the judge was satisfied. He referred to the degree of commitment to them, exhibited by the determination with which, when he could, the father consistently took advantage of opportunities for contact with them. He had also taken steps to follow their progress at school. Mrs Pinkham, on the other hand, seeks to support the judge's order, affording the father, as it did, the chance to show that his commitment to the children extended to the burdens of looking after them, as well as the enjoyment of doing so. She urged upon us that it is not simply

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a question of money. It goes further than that because the father seems at all times to have been determined not to pay, even when he knew that the mother was in financial difficulties. Such an attitude, Mrs Pinkham submitted, demonstrates a degree of contempt. It is true that the father has shown some commitment by contact with the children but there is more to commitment than mere contact. The father's attitude to the mother is also indicated by the fact that he began a relationship, it is said, with the woman with whom he is now living, even before C was born. In aid of her submissions about what is to be expected of a father, she referred to a passage from the judgment of Butler-Sloss LJ in *Re S (Parental Responsibility)* [1995] 2 FLR 648, when she said at 659D:

‘A father who has shown real commitment to the child concerned and to whom there is a positive attachment, as well as a genuine bona fide reason for the application, ought, in a case such as the present, to assume the weight of those duties and cement that commitment and attachment by sharing the responsibilities for the child with the mother. This father is asking to assume that burden as well as that pleasure of looking after his child, a burden not lightly to be undertaken.’

Implicit in those comments, says Mrs Pinkham, is the need for a father to be prepared to assume the burden as well as the pleasure in a way that this father, since he is making no contribution to their maintenance, is failing to do. Also invoked by Mrs Pinkham, though not adverted to by the judge, is the father's persistent refusal to divulge his telephone number to the mother who has therefore no direct means of contact with him. It is said that had either child been seriously ill or required hospital treatment, it would have been impossible for the mother to consult the father. There is nothing in the evidence that we have seen that would have suggested any inclination on her part to do so, even had she had the opportunity. It is said that there is hostility brewing in the mother's household and that the court should recognise the failure to pay goes beyond mere failure to provide for the children's material benefits. It is said that the mother is becoming more than irritated by the father's continuing failure, and so that has an impact on the quality of the children's lives and on their welfare, because it affects the stability of the unit in which they now live.

The question therefore is whether the father's failure to pay maintenance, with all that that may involve, should disqualify him from having the parental responsibility orders that he seeks.

In his careful judgment, to which I pay my tribute, the judge was rightly critical of the father for not pulling his weight by providing financially for his children when he can. If he really cared

about them he might reasonably be expected to pay maintenance for them. Of course, he is in no way relieved from that responsibility by the fact that the children are not living with him, and he is evidently intelligent enough to realise that. There is an understandable question why he should have a say in the future of the children if he is not prepared to provide for them financially. So long as he is not providing any maintenance the mother is unlikely to be sympathetic with him with regard to contact. His failure to pay any money to the children is therefore a source of dissension. That is not the way to put the children's welfare first.

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The court ought not, in my judgment, to use the weapon of withholding a parental responsibility order for the purpose of exacting from the father what may be regarded as his financial dues. That approach fails to give him proper credit for his sustained attempts to have contact with both children whenever he could. Though he is failing the children by not putting his money where he says his heart is, it must, in my judgment, be in the children's best interest that their natural father should at least be accorded that voice in their future which is implicit in a parental responsibility order. Not only was the judge so diverted by the father's financial shortcomings that he failed to pay proper regard to such merits as he had, but he was also unmindful of the statutory requirement that orders relating to the upbringing of children should be made without delay. The cases show that when a father shows some devotion to his children he should ordinarily be granted a parental responsibility order in the absence of strong countervailing circumstances. Deplorable though this father's failure to provide for his children has been, it ought not, in my judgment, to disentitle him to a parental responsibility order. If he will not pay voluntarily for his children's maintenance, there are other ways of forcing him to pay when he can. A 'wait and see' order, with the ulterior motive of pressuring the father to pay maintenance, was inappropriate. I would therefore allow the appeal and make the order.

DOUGLAS BROWN J:

I agree. I join with my Lord in saying that the judge is to be commended over the care and wisdom displayed on the contact application. However, the judge was plainly wrong in postponing the parental responsibility order applications indefinitely. He did not refer to s 1(2) of the Children Act, already referred to by my Lord, and the suspicion must be that he was using the adjournment to produce maintenance payments from the father. The judge should either have refused the applications or granted the applications, which, on an overall view of the evidence, he should have done. The judge had to carry out a balancing exercise but he did so in such a way as to place undue emphasis on the factor of the father's obstinate refusal to pay maintenance. This was at the disadvantage of not placing enough emphasis on the equally important factors which were present. Those were the fact that it was a genuine application. There was proven attachment to the children. The judge specifically found that the father was genuinely interested in the education and welfare of the children. Added to that, he had approved a fortnightly visiting contact arrangement with such other contact as the parties agreed. But all those factors were to be taken into account. The obstinate refusal to pay maintenance, important though it was, fell into the background. The order should have been made.

Appeal allowed. Parental responsibility order made.

Solicitors: *Geoffrey Leaver* for the father

Paul Montgomery for the mother

DEBORAH DINAN-HAYWARD

Barrister