

**R v E AND F (FEMALE PARENTS: KNOWN FATHER)
[2010] EWHC 417 (Fam)**

Family Division

Bennett J

12 February 2010

*Family proceedings – Parental responsibility – Female couple parenting child
– Whether biological father who had shown commitment to child entitled
to parental responsibility order*

The child's biological mother was an English woman in a civil partnership; his biological father was an American man in a same-sex marriage. The child's home was, from birth, with the mother and her civil partner. The mother's female partner acquired joint parental responsibility for the child as a step-parent, pursuant to a written agreement with the mother. Although the father's name was given on the birth certificate, he had not thereby acquired parental responsibility for the child (the law as to parental responsibility and unmarried fathers had been changed subsequently). However, the father and his partner were involved in the child's life from birth; they both came to England regularly, staying in the home of the mother and her partner, going on holiday with them, and were consulted about important decisions. After a dispute about the best way in which to discipline the child, the relationship between the four adults to some extent broke down. The father continued to see the child on regular visits to England, but was no longer welcome to stay in the home that the mother and her partner shared with the child, or to go with them on family holidays. Dissatisfied with contact arrangements that did not allow overnight visits either in England or the USA, the father issued first an application for staying contact and parental responsibility, and then an application for shared residence. In response the mother and her partner applied for a joint residence order (in favour of each other). A child and adolescent psychiatrist reported that the child, now 7 years old, perceived the mother and her partner as his parents, although he was aware of and loved the father; she recommended that the father obtain a suitable property in England, large enough for the child to have his own room. Within a short time, at the child's request, overnight contact had started, and proved very successful. There was now broad agreement on contact for the coming year. However, the issues of parental responsibility and residence were not agreed by the parties, and there remained an issue as to the extent to which the child should divide his time between his female parents and his father in the long term.

Held – making a joint residence order in favour of the female parents, approving contact arrangements involving no more than 50 days per year spent with the father; dismissing the father's applications for parental responsibility and shared residence –

(1) The pre-birth agreement between the four adults as to the way in which the child would be parented had been that the mother and her partner were to be the child's parents, although the father was to have an important role. Parenting involved exercising responsibilities in relation to, as well as caring for a child: the mother and her partner had borne the responsibility for bringing the child up and had taken all the decisions affecting his welfare. There was no evidence to suggest that the father had been co-parenting the child, or was regarded by the child as a parent (see paras [39], [41], [43], [45], [47], [48]).

(2) Section 11(5) of the Children Act 1989 which provided that a joint residence order in favour of parents would cease to have effect if the parents lived together for more than 6 months did not apply to a joint residence order granted to two people already living together, but to a joint residence order granted to two parents living separately, who subsequently resumed living together for more than 6 months. An

order for joint residence to the female parents was in the child's best interests, so that the child would know where his home was, and he would be reassured as to the future should anything happen to the mother (see paras [66], [71]).

(3) In cases 'outside the ordinary run of parental disputes on separation' it was particularly important to recognise that parental responsibility applications remained subject to the overriding provisions of s 1 of the 1989 Act. It would not be in the child's best interests to grant the father parental responsibility when the father was asserting that the four adults and the child comprised one family, whereas the reality was that the child's nuclear or central family consisted of the child and the female parents who had cared for him and taken decisions as to his welfare and upbringing, albeit after consultation with the father. The father was mistaken in his attempt to equate the situation with that of a family post-divorce or post-separation and the female parents had good reason to perceive his stance as a direct threat to the autonomy of their family. Granting the father parental responsibility in this situation would generate conflict with the female parents, and distress them, without giving the father any practical advantage: the father's position was already recognised by the female parents who had not attempted to marginalise him after the dispute, and who had consulted and would continue to consult him as to significant decisions. The child's relationship with the father could be fully promoted by contact arrangements, although contact equating to half the child's non-school time would send out entirely the wrong message, and would seriously curtail the time the working female parent would be able to spend with the child (see paras [48], [58], [85], [91]–[94], [96], [98], [101], [103], [104]).

Statutory provisions considered

Children Act 1989, ss 1(1), (5), 3(1), (5), 4A(1)(a), 8, 11(5)
 Human Fertilisation and Embryology Act 1990, s 28(3)
 Civil Partnership Act 2004

Cases referred to in judgment

B (Role of Biological Father), Re [2007] EWHC 1952 (Fam), [2008] 1 FLR 1015, FD
D (Contact and Parental Responsibility: Lesbian Mothers and Known Father), Re [2006] EWHC 2 (Fam), [2006] 1 FCR 556, FD
H (Parental Responsibility), Re [1998] 1 FLR 855, CA
S (Parental Responsibility), Re [1995] 2 FLR 648, CA

Ayesha Hasan for the applicant

Peter Jackson QC for the respondents

Cur adv vult

BENNETT J:

[1] Daniel, as I shall call him, is now nearly 7 1/2 years old, having been born on 3 September 2002: since his birth he has lived in London with his mother, Emily, and her partner, Frances (not their real names). Emily is now 46 years old, Frances is 50 years old. In June 2006 Emily and Frances became civil partners pursuant to the provisions of the Civil Partnership Act 2004.

[2] On 11 June 2008 Emily, the mother of Daniel and having parental responsibility for him, entered into a written agreement with Frances pursuant to s 4A(1)(a) of the Children Act 1989 whereby Frances gained parental responsibility for Daniel. Thus from that point on Emily and Frances both had parental responsibility for Daniel.

[3] Richard is Daniel's biological father. He is now 49 years old. He has been in a long-standing relationship with John, who is 64 years old. (Again,

these are not their real names.) They live in the State of Massachusetts. In the eyes of the law of the State they are a married couple, having gone through the prescribed ceremony. In the statements in this case Richard refers to John as his 'husband'.

[4] The applications before me in this case, which all concern Daniel are as follows. On 4 April 2009 Richard issued an application for staying contact and parental responsibility. On 23 June 2009 Richard applied for shared residence. On 4 August 2009 Emily and Frances applied for joint residence – that is to say with each other.

[5] So far as staying contact is concerned, there is now a large measure of common ground, to which I will come in due course. Emily and Frances resist Richard's application for parental responsibility and shared residence. Richard resists Emily and Frances's application for joint residence.

[6] I have heard evidence from Dr Claire Sturge and all four adults. Dr Sturge's evidence was based on her report of November 2009, she having seen all the adults and Daniel. Each of the adults has made statements in this case.

[7] It is tragic, particularly from Daniel's perspective, that the court has had to be involved at all. I say that because until the early part of 2008 the relationship between Richard and John on the one hand and Emily and Frances on the other was very harmonious. By way of illustration, when Emily and Frances underwent the ceremony in June 2006 to become civil partners, Richard and John were their 'best men'. Further, until 2008 Richard, and indeed John, regularly saw Daniel when they were in England.

[8] Let me now set out the background. John is an American citizen. He was married when he was 24 years old. By his former wife, he has three children, and he and his former wife were divorced in 1987. In 1988 he and Richard met in the USA and they have been in a loving relationship ever since.

[9] Richard is both Dutch and South African from his mother's side, and British from his father's. In about 1997 Richard met Frances at a party in New York. Through Richard, John met Frances. At about this time or shortly thereafter Emily and Frances became partners. All four adults became very good friends.

[10] Emily and Frances had discussed having a child and possible donors. They decided that it would be best if Emily was the mother. In October 1999 Frances and Richard went on a holiday together in Bhutan. Frances, during the course of that holiday, introduced the subject of Emily wanting a child. Following their return to New York there was much discussion between all four adults. It was eventually decided that Emily would be the mother and Richard the father. Insemination was tried in New York, but it was unsuccessful.

[11] In 2001 Emily and Frances moved to London as Frances had accepted a job there. Nevertheless, the friendship between the adults continued. In September 2001 Richard passed through London, attended a fertility clinic and in January 2002 Emily became pregnant.

[12] Perhaps unsurprisingly, the parties' perception of the role to be played by Richard in the child's life differ in their recollection of what was said prior to Daniel's birth. Richard's recollection is that Emily and Frances told him and John that they felt that it was important for a child to have a father who

wants to play an active role in the child's life. They wanted a good friend to be the father rather than a mere sperm donor.

[13] John's recollection is that Richard, who had been a good stepfather to his children, wanted to be fully involved with the child as a father. Emily and Frances agreed that they would want to make final decisions about the child, having consulted Richard.

[14] Names were discussed, in particular that the child should have the surnames of Richard and Emily and Frances as his names, and Emily's surname as Daniel's surname. John's recollection is similar to that of Richard.

[15] Emily's recollection is that the child to be born would have a positive and meaningful relationship with Richard as the child's biological father, but that the child would be brought up and parented by her and Frances. She had no intention of co-parenting with someone who was never going to live with her and Frances.

[16] Frances's recollection is that Emily would be the biological mother and that Emily would give up her career. After considering a number of people, Emily and Frances decided on Richard because he was interested in having children and was in a stable relationship, and because he and John were happy to have Emily and Frances bring up the child, with Richard and John having a background role. In 2002 the matter was discussed between all four of them. Richard's only condition was that if the child was a boy he should not be circumcised. Emily's sole condition was that, as a result of her mother leaving her when she was 7 and the consequences following from that, Richard would never try to take the child away from her for any period alone without her. Richard and John agreed. Had they not, Emily and Frances would not have proceeded with Richard as the father.

[19] Frances was present at Daniel's birth. It was a joyous occasion for both her and Emily. Richard arrived in London on the day of Daniel's birth and John followed on a few days later. Richard and John stayed in London for about 2 weeks. On 22 September Richard returned for a further 23 days. He says that he helped to feed Daniel, change his nappies and take him for walks. Emily says that she had arranged a live-in maternity nurse and that Richard's account of his care of Daniel is overstated. What is common ground is that not only did Richard stay in London for those two periods of time, but also that until 2008 when Richard visited to see Daniel he stayed with Emily and Frances in their house in London.

[20] When Daniel's birth came to be registered Richard was entered as Daniel's father and Emily as Daniel's mother. That, of course, did not give Richard parental responsibility because the law in that respect had not by then changed. Daniel's other registered forenames are Frances's surname and Richard's surname. His registered surname is the same as Emily's.

[21] In September 2003, Daniel, Emily and Frances moved to their present accommodation in London, which is a large family house with three bedrooms. When Richard and John stayed, Emily and Frances looked upon them as their guests. Between 2003 and April 2008 the adults and Daniel went on several holidays together. In August 2005 Emily and Daniel travelled to Richard and John's home in Massachusetts. Frances travelled a little later.

[22] Between 2005 and 2007 the adults talked about providing a sibling for Daniel with Richard as the father. Indeed, they did try to produce a sibling but it, in the end, failed.

[23] In the autumn of 2007 Daniel began attending the school in Central London where he remains. Richard and John made known to Emily that they would be in South Africa between 19 February and 23 April 2008. According to Richard, Emily expressed concern that Richard would not see Daniel during that time. Richard, therefore, invited Emily and Frances and Daniel to join them in South Africa for some 10 days, which they accepted.

[24] On 10 December 2007 Richard saw Daniel in London. There was then a gap. On 13 February 2008, prior to Richard and John going to South Africa, they came to stay with Emily and Frances and Daniel. An incident occurred which Emily has described as ‘damaging’. It is unnecessary to set out all the detail of what happened. Richard believed that Daniel’s behaviour was ‘unacceptable’ and gave him ‘a small smack on his bottom’. Richard told Daniel to stop this behaviour, which, according to Richard, he did not. Richard smacked him again. Richard said to Daniel that he would smack him again if he did not behave. Daniel began crying and ran downstairs. Richard says that none of the smacks were given with any force and would not have hurt Daniel. According to Emily, Daniel told her that Richard had smacked him hard. Emily agrees that she spoke to Richard about the incident in front of Daniel. Richard describes it as Emily ‘berating’ him.

[25] Thereafter Richard and John left for South Africa, and later they were joined by Emily and Frances and Daniel. Emily describes the holiday as ‘very unpleasant’. Richard describes it as ‘extremely stressful and tensions ran very high’. He and John became, they say, concerned about important aspects of Daniel’s upbringing – for example, he would not feed himself aged 5 1/2, and bite-sized pieces of food were put into his mouth. Furthermore, Richard and John felt that he was being spoilt. Finally, while shopping in Cape Town Richard was on his mobile and Daniel pulled at his arm. John took Daniel away by his arm. Daniel wrenched his arm from John’s grasp. Daniel had marks on his wrist which did not take that long to go.

[26] On 26 April 2008, now back in England, the four adults went for lunch in a restaurant so that Richard and John could talk about their concerns, as they saw them, as to Daniel’s upbringing. The meeting lasted for 3 1/2 hours. According to Emily, Richard and John told them that they believed that Daniel was ill-disciplined, poorly parented and did not understand right from wrong because he had not been taught proper values. John told them that only he really understood how to discipline Daniel. Richard agreed and said that he wanted the right to discipline Daniel. Emily says that after the meeting, which found no common ground, she and Frances felt offended at Richard and John’s attitude particularly in the light of their devoted care to Daniel.

[27] The parting of the ways now became more apparent. In late May 2008 Richard did not stay with Emily and Frances when he came to see Daniel. Emily and Frances asked Richard and John to come on their holiday to Italy in the summer but received no response.

[28] In July there came an incident which Richard has described as the ‘turning point’ in his relationship with Emily. Emily says that Richard spoke to her in a bullying manner and said to her, ‘Do you want Daniel to have a father at all?’ Emily replied that she frankly did not care whether she saw him or his family again. Emily says that she said that in the heat of the moment. Richard says that Emily was distant and ignored him. When he asked her why she was being hostile to him, Emily replied that after the lunch (which I have

just mentioned) she had thought deeply. She had emerged from a long, dark tunnel. She wanted nothing further to do with him or his family, he was no longer welcome in her home and there would be no future family holidays together. She would allow him to see Daniel for short periods in London, but beyond that wanted nothing further to do with him.

[29] In November 2008 the relationship seems to have got worse. Richard felt that his contact with Daniel was being curtailed. Richard sent a long email, which ended with him proposing staying contact between him and Daniel. In reply, Emily set out her position about why her attitude to Richard had changed, basically due to the incidents in 2008, to which I have referred. The email exchange continued until early 2009. Unsuccessful mediation took place. Thereafter legal proceedings began, as I have recounted.

[30] On 25 June 2009, Deputy District Judge Solomons made an order permitting the parties to jointly instruct Dr Claire Sturge, a child and adolescent psychiatrist, to report on: (i) the parental roles of the parties; (ii) the impact on Daniel, Emily and Frances of granting parental responsibility and/or shared residence to Richard; and (iii) staying and holiday contact. An order for interim visiting contact was made on defined dates and times.

[31] Dr Sturge was duly instructed. Her remit is set out in the first page of her report of 12 November 2009. One of her recommendations was that Richard should consider getting a suitable property in England 'where Daniel's own room and space can be provided'.

[32] Richard and John followed up that advice. In December 2009 they orally 'leased' from a friend, for an indefinite period, a two bedroom flat in Wimbledon. By then, of course, a timetable of visiting contact had been put in place for over Christmas. On one such visit by Daniel to Richard and John on 23 December, Daniel telephoned Emily and asked if he could stay overnight. Emily and Frances readily consented. Daniel, accordingly, stayed overnight with Richard and John and it was a great success. Emily and Frances then agreed that Daniel could spend another night with Richard and John, which took place on 27 December, and which again was a great success.

[33] Further agreements were arrived at to enable Daniel to stay with Richard and John before and after this hearing. Daniel stayed with Richard and John over the night of Saturday, 6 February. Again, it is common ground that it went very well and Daniel much enjoyed himself. He is due to stay with Richard and John over the night of Saturday, 13 February. Dr Sturge in her evidence described these overnight contacts, with one to come, as 'great progress'.

[34] After Dr Sturge had given her evidence on day one and before the four adults came to give evidence, I invited the parties to reflect overnight on their positions with a view to seeing if their differences could be narrowed, even eliminated. On day two I was told that progress had been made on the issue of contact, but not on the issues of Richard's application for parental responsibility and shared residence and Emily and Frances's application for joint residence.

[35] Insofar as contact was concerned, it is agreed that for the rest of 2010 there will be staying contact on agreed dates during each month. Additionally, there would be two two night weekends on dates to be agreed. Thus, between

now and the end of December Daniel will spend 29 nights and 37 days with Richard and John, plus a visiting contact of 3 hours on Daniel's birthday.

[36] For 2011 it is agreed (save where I hereafter indicate) that Daniel should have staying contact with Richard for one week in the Easter holidays, 4 days and nights at the summer half-term, one week in the summer holidays, but here Richard wants a fortnight, one week at the October half-term, and one week in the Christmas holidays. In addition, there will be two separate two night weekend staying contacts, with dates to be agreed, and a third separate two night weekend between 1 and 3 September.

[37] In 2012 and beyond the parties disagree. Emily and Frances want the arrangement for 2011 to continue. Richard wants staying contact to Daniel for half of the half-terms and half of the school holidays, plus contact with Daniel if he happens to be in London during term time.

[38] I must now to make certain findings of fact which, in my judgment, are important in order to resolve the difficult issues in this case.

[39] One important issue is what agreement was arrived at between Richard and John on the one hand and Emily and Frances on the other as to how the child would be parented after its birth. Such an issue comes to be resolved by the court about 10 years or so after the relevant discussions took place. In the light of the near breakdown in the relationship between Richard and John and Emily and Frances in 2008, and in the context of fraught litigation, there is always room for recollection and/or perceptions to become distorted.

[40] I am satisfied that Richard and Emily very much wanted to become a father and a mother respectively. It could be argued, but I am satisfied in this case that such would be a misapprehension by the court, that Richard and John on the one hand, and Emily and Frances on the other were so desperate for a child that that overbore rational discussion. I do not consider that that was the position here. Each of the four adults are very intelligent and articulate people. Their discussions took place over a considerable period of time.

[41] It would be close to impossible in a case such as this, absent relevant contemporary documentation, to conclude whose perceptions of what was agreed are likely to be the more accurate, based only on an evaluation of the evidence of each of the adults' state of mind in 1999/2000. In my judgment, the key is to look to see how the adults behaved once Daniel was born. For that, in my judgment, is more likely to assist me in determining what was the nature of the agreement and whose oral evidence is the more reliable.

[42] There is no doubt that Richard assisted with Daniel's care immediately after his birth. Richard was put on Daniel's birth certificate as his father, and one of Daniel's names is Richard's surname. Richard and John came regularly to England and saw Daniel, and holidays were taken with Daniel by all four adults together. I also have no doubt that Richard and Daniel had and have a very loving relationship. Daniel has called, and continues to call, Richard 'Daddy'. Richard has been consulted by Emily and Frances in the matter of Daniel's schooling and kept informed of any major health issues.

[43] However, in my judgment, there is no evidence to suggest that Richard, whether on his own or together with John, was co-parenting Daniel. Parenting, in my judgment, involves not just caring emotionally and physically for a child – important though that is – but also taking decisions

and exercising rights and responsibilities in relation to that child. In other words, parenting involves exercising responsibilities. Section 3(1) of the Children Act 1989 defines parental responsibility as meaning:

‘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.’

[44] The Law Commission, in recommending the use of the term ‘parental responsibility’, suggested that it would reflect the everyday reality of being a parent, and would emphasise the responsibilities of all those who were placed in that position – see *Guardianship and Custody*, Law Com No 172 (HMSO, 1988), para 2.4.

[45] Thus, in the instant case, it is pertinent to ask who were the adults who actually carried out not only the care of Daniel day to day, but also who bore the responsibility of bringing Daniel up and who took the necessary decisions for his welfare? In my judgment, the answer must be Emily and Frances.

[46] When he was cross-examined Richard agreed that between 2002 and 2008 – that is to say when the adults’ relationship became fractured – all the decisions were taken by Emily and Frances, albeit after consultation with Richard. Emily and Frances’s evidence was to the effect that not only did they care for Daniel on an everyday basis, but that they were the decision-makers and thus they bore the responsibility for making decisions affecting Daniel, his lifestyle and general welfare. By way of example, in 2005 Daniel went to nursery school, followed in September 2007 by going to school. In 2007 Richard suggested another school as an alternative. But Richard accepted that, having consulted him, Emily and Frances were the decision-makers of which school Daniel attended.

[47] I, therefore, accept the standpoint of Emily and Frances that Daniel’s family consisted of Daniel, Emily and Frances, and that prior to the incidents of 2008 Richard saw himself as the loving father of Daniel, but that Daniel’s parents were, in reality, Emily and Frances. That accords with Dr Sturge’s evidence to me that she believes that Daniel regards Emily and Frances as his parents – that is to say, as Dr Sturge explained, they are the people who look after him and take the decisions about him. In Dr Sturge’s view, Daniel used no words to her which could indicate that he looked upon Richard as one of his parents.

[48] I, therefore, conclude that the arrangement arrived in 1999/2000, or in any event before Daniel’s conception, was that Emily and Frances were to be his parents. His family was to be Emily and Frances and himself. Richard would have a role to play, and an important one, beyond merely identifying him as Daniel’s father in the life of Daniel. I reject the evidence of Richard, supported by John, that he was to be not just Daniel’s father, but also one of his parents. I specifically reject their evidence that Richard and John and Emily and Frances together with Daniel were to be one family. I am sure that Richard and John have striven to tell me what they perceive to be the truth. It is their perception of what occurred in 1999/2000 which I have to find has become distorted in the prism of the fracture of the relationship in 2008 and the ensuing litigation. I find the evidence of Emily and Frances to be the more reliable.

[49] Why the relationship fractured is to my mind not as significant as to how the parties behaved as it broke down. Richard, who had not seen Daniel for about 2 months, by February 2008, tried to discipline Daniel by smacking him. I am sure they were light smacks, but they were sufficient to upset Daniel. I think that Richard behaved unwisely in seeking to discipline Daniel at all. Surely the better way, and it is easy to say so with hindsight, to have gone about it was to have had a quiet word with Emily and/or Frances and leave it to them to discipline Daniel, if appropriate. But Richard's behaviour could, legitimately, be seen by Emily and Frances not just as inappropriate but also an invasion of their responsibility for Daniel's behaviour. Emily too made a mistake. She spoke, probably in a rather hot-tempered way, to Richard – there was nothing wrong about that – but it was in front of Daniel.

[50] The position worsened during the holiday in South Africa. Again, in my judgment, I think Richard and John behaved rather unwisely in criticising the way Emily and Frances were bringing Daniel up. At the lunch on 26 April they again criticised the upbringing of Daniel in behavioural matters, and in particular suggested that Daniel might need professional help. Thus, the trespassing into Emily and Frances's responsibility became clearer. Indeed, Richard said that he wanted the right to discipline Daniel.

[51] I have no doubt that the behaviour and attitudes of Richard and John in 2008 had a profound impact, particularly on Emily. She was indeed deeply concerned at their attitudes.

[52] One can see the impact on her in the grant of parental responsibility to Frances. I will elaborate on that now. In June 2008 Emily and Frances entered into a step-parent agreement by which Frances was given parental responsibility for Daniel. Emily told me that the agreement was made because their registration under the 2004 Act revoked their wills. After the parental responsibility agreement, Daniel was a child of the family and if Emily were to pre-decease Frances, Frances would have parental responsibility for Daniel. She accepted that she did not tell Richard and that Richard only learned about it in early 2009. She told me that she did not tell Richard at the time as their relationship was such that she feared it might provoke Richard into applying for parental responsibility. She told me that it was the only time she had ever withheld any information concerning Daniel from Richard.

[53] Frances told me that they only got round to the parental responsibility agreement in June 2008 because it had been delayed due to her breaking her leg and her stepfather dying. Furthermore, probate lawyers whom they instructed were considering the best way to enshrine Frances's role should Emily pre-decease her. The wills that they made at about that time appointed a guardian for Daniel who lives in England.

[54] I want to be clear. I do not find that the parental responsibility agreement was concluded because of the fracturing of the relationship. I accept Emily and Frances's description of how it came about, but I do find that Richard was not told about it because the relationship broke down, and that Emily was fearful of Richard's reaction given what had already happened in 2008.

[55] That Richard and John's attitudes had a profound impact on Emily was also illustrated by the row that took place in July, which has been described as the 'turning point'. In that row Emily snapped and said things to Richard which, on reflection by her I am satisfied, she did not truly mean. But

her harsh words to Richard, whilst very upsetting and distressing to him, are an accurate reflection of Emily's thinking, namely that the comments of Richard and John were seen by her not just as a criticism of her parenting, but as a threat to the integrity of the family of herself, Frances and Daniel.

[56] For his part, Richard took Emily's words at face value, not as a comment said in the heat of the moment – see the first sentence of para 39 at C166, which he confirmed in his cross-examination. Richard does not seem to have reflected whether or not in the light of the harmonious relationship from 2002 onwards, and indeed before, Emily really meant what she said; nor whether his behaviour and attitudes in 2008 had contributed to Emily's apparent thinking. Nor does Richard seem to have accepted Frances's reassurances to him. She was not present at the time of the row, but she came home and was told what had happened. I accept that Frances did try and reassure Richard that he, Richard, would always be welcome in their house and that neither she nor Emily would do anything to stop his good relationship with Daniel. Indeed, as Frances pointed out in her evidence, Richard saw Daniel that afternoon, the next day and 2 days later.

[57] Richard feels strongly that in the second half of 2008 and on into 2009 his contact with Daniel was marginalised. One of the reasons he gave me for applying for shared residence was that he did not wish to continue to be marginalised. During his cross-examination by Mr Jackson it emerged what he meant. Mr Jackson pointed out to him that in 2007 he had seen Daniel on 48 days, including holidays; in 2008 44 days, including holidays; and in 2009 40 days and 2 nights. Richard then said that it was the restriction of the hours during each visit that he was allowed to spend with Daniel that constituted him being marginalised.

[58] It must be remembered that prior to the breakdown in 2008 Richard, and John when he came, stayed in Emily and Frances's home, so Richard would be present when Daniel woke up and when he was put to bed. At some point after the rupture occurred, but not later than early 2009, Richard stopped staying in Emily and Frances's home. Thus, it may be that the actual number of hours may indeed have decreased, but, and this is the important point, in my judgment, there was no marginalisation, directly or more subtly of Richard by either Emily or Frances. I find that Emily and Frances remain as committed in 2008 and onwards to the relationship that Daniel and Richard have had with each other since his birth.

Shared residence

[59] It is not without significance that this application was not the first application of Richard's in point of time. It came some 2 months after the application for parental responsibility and defined contact. Richard's first statement of 15 April 2009 was in support of those two applications and thus made no mention of shared residence. On 23 June 2009 Richard issued his application for shared residence giving as his reasons:

'As Daniel's father I want to be recognised as an equal parent. I want to be consulted where important decisions are being taken in order to have an equal importance in the direction of our son's life. Also I can avoid being marginalised and acquire the parental responsibility which I seek.'

[60] At that time, Daniel had never spent a night in the care solely of Richard or of Richard and John. He had, in fact, never spent a night away from Emily. He had lived all his life in the home of Emily and Frances. Furthermore, the reasons he gave are, surely, his reasons for wanting parental responsibility, to which I will come.

[61] During the course of his evidence, and in answers to questions by me, Richard told me that his real case is his application for parental responsibility. He told me that if he were granted parental responsibility, together with defined contact, then he was not sure there was any difference between that on the one hand and shared residence, together with parental responsibility, on the other. Later he was more specific. He told me that if he obtained parental responsibility and defined contact he would drop his opposition to Emily and Frances's application for joint residence. He put it like this, and these are his words, 'I would have what I was looking for'.

[62] In her final submissions, Miss Hasan, for Richard, sought to press for an order for shared residence but was constrained to accept that if it was in the best interests of Daniel for a parental responsibility order to be made in favour of Richard, then, as she put it to me in her submissions, 'shared residence goes'. In my judgment, she was right to make that concession. The real issue in Richard's case is about parental responsibility and not shared residence.

[63] Thus, my decision on this application can be made on the basis that I have just set out. But, if I need any further reasons, then I must evaluate the evidence of Dr Sturge on this issue for when she gave evidence she firmly came out against shared residence. Her reasoning was that shared residence did not say anything as to where Daniel's central home was. She said that, for her, shared residence was a sticking point. Thinking of it from Daniel's point of view, shared residence would lead to a lot of complications. Her evidence on this point was attacked by Miss Hasan on the basis that she had made no recommendation in her written report one way or the other about shared residence. Strictly speaking, that is correct, and, in my judgment, it might have been better had Dr Sturge there made a recommendation one way or the other, or said that she was unable to make any recommendation.

[64] However, having read Dr Sturge's report, I think that Miss Hasan's criticism is misplaced. Under the title 'Parental relevance of the parties', Dr Sturge says at para 119:

'I see these as Emily being the main carer and mother to Daniel; Frances being a fully integral part of the 'nuclear' family and a co-parent with Emily and increasingly spending significant amount of time with Daniel; Richard being Daniel's father and separate from his immediate/'nuclear' family; John as an interested party who cares deeply about Daniel and who is part of the paternal role, supporting Richard.

Under the title, '3A, The impact of granting parental responsibility and/or shared residence to the applicant on (a) Daniel; and (b) the respondents' she says as follows:

'128 I would see all this as dependent on how the court decides to view the four adults and their role in Daniel's life and upbringing.

129 Parental responsibility *per se* will have no meaning and little direct importance to Daniel himself. The consulting of his father about decisions for him can happen with or without the PR and what is important in how Daniel views his father is that he knows he has or has not a role in such decisions.

130 If this were a situation of separated parents, then Richard would meet the criteria usually taken into account, commitment, interest, reliability, involvement in his life. But in my opinion, one does have to take into account the anomaly of the family structures, ie the legal decision should reflect how a same-sexed parenting family structure is viewed. Is it “the” family? It is certainly deemed as such where the biological father is unknown. How does the known-ness of the father affect the situation?’

At para 138, Dr Sturge says:

‘Any solution needs to take the following into account ...

(d) that Daniel sees his home with his mother and Frances as his “home” and base and that at present his sense of himself and of his security is located there. This needs to be respected and explicitly endorsed by Richard and John.’

At para 139 she says:

‘What should happen first is that the adults repair their relationship. They need to decide how best to do this. I do not see this as mediation or something to be focused on Daniel but focused on a determination to regain a position where trust can be rebuilt. This may require Richard and John acknowledging just how undermining the “co-parenting” couple have experienced their legal intervention and Emily acknowledging that in response she has assumed a rather inflexible position. Richard and John need to re-assert their understanding that Emily and Frances both being Daniel’s immediate and central to him in the meaning of “family” [sic]. The apparent side-lining of Frances eg talk of Richard being the “only” parent if Emily were to die/be unavailable to Daniel, needs to stop as this is a direct denial of the parenting role of Frances. In any case the situation eg Daniel’s age and needs are likely to be vastly different and would need considering at the time if some unforeseen upheaval in his life were to occur.’

[65] In my judgment, whilst it might be said that all I have recited from her report was focusing more on whether Richard should be granted parental responsibility, it is surely material which the court can take into account in deciding the issue of shared residence. Further, in assessing the intrinsic quality of Dr Sturge’s recommendations, her evidence is, in my judgment, logical, rational and compelling. Accordingly, I dismiss the application for shared residence and find that it is not in Daniel’s best interests.

Joint residence

[66] I can take this shortly. In my judgment, it is in Daniel's best interests now and in the future that an order is made, so that Daniel knows and will know that his home is with Emily and Frances. Furthermore, it would provide reassurance to Daniel should Emily become incapacitated from caring for him, or die, whilst he is a child.

[67] Richard, in his statement of 15 September 2009, sets out six reasons for opposing an order for joint residence. Emily in her response of 1 October 2009, deals with each in turn. In my judgment, Richard has made some serious errors. The more serious are these. Far from Frances never wanting to play a parental role in Daniel's life, the opposite is true. Far from Daniel not considering Frances to be his parent, the opposite is true. That was the evidence of Dr Sturge, Emily and Frances. In his cross-examination Richard said that Frances is to be regarded as a parent, and that that constituted movement on his part. Finally, Richard said in that statement that, if anything happened to Emily rendering her unable to care for Daniel whilst he was a minor, as Daniel's father he should have custody of Daniel.

[68] One can well imagine the distressing impact that this, I am satisfied, had on both Emily and Frances. It simply made a bad situation worse. It exacerbated the anxiety of Emily in particular. In the witness box Richard apologised for his wounding remarks. He also, in my judgment, sought to back-pedal. He said that custody would not be an automatic answer, but him having parental responsibility would assist in such a situation, as he would have some standing.

[69] I am sorry to have to say that I think not only was the application for shared residence misconceived, but also Richard's opposition to the application for joint residence was also inappropriate and not in Daniel's best interests. Both the application for shared residence and the opposition to joint residence was an escalation, and, in my judgment, an unjustified escalation at that. The real issues in this case have been those of parental responsibility and staying contact, which, be it noted, came first in time. One of the consequences of this unjustifiable escalation was to heighten the anxieties of Emily, in particular, who, it is plain from seeing her in the witness box, is a highly strung person.

[70] Miss Hasan has submitted that, as a matter of law, if I were to make a joint residence order to Emily and Frances, both of them having parental responsibility, then after Emily and Frances have lived together for another 6 months the order would cease to have effect. She relies for that submission upon s 11(5) of the Children Act 1989, which provides as follows:

'Where (a) the residence order has been made with respect to a child; and (b) as a result of the order the child lives or is to live with one of two parents who each parental responsibility for him, the residence order shall cease to have effect if the parents live together for a continuous period of more than six months.'

[71] I am satisfied that Miss Hasan's submission is misconceived. As Mr Jackson submitted, if I make a residence order it will be to two people, not one. The result of such an order is that Daniel will reside with Emily and Frances, not one of them. The sub-section is, in my judgment, intended to

cover a situation where two parents, each with parental responsibility, separate, then a residence order is made in favour of one, and then the two parents resume living together for a period in excess of 6 months. That, of course, is not the case here.

[72] Accordingly, in my judgment, it being in Daniel's best interests, there will be an order for joint residence to Emily and Frances.

Contact

[73] In the light of the large measure of agreement, like Dr Sturge, I see this as a very positive development. Both sides have retreated from what Dr Sturge saw, and so expressed it in her evidence, as each side's rather inflexible positions. There remain three issues, two of what I might call practical arrangements, and one which Emily and Frances see as a matter of principle.

[74] As to the first two issues, my decision is, for 2011, that Daniel will have one fortnight in the summer holidays. Daniel will by then be almost 9 years old and will have had one year at the new school, to which he goes in September 2010. Between now and the summer of 2011 staying contact is likely to prosper. Daniel is likely to enjoy it very much, and by the summer of 2011 I hope that he will be able to cope with a 2-week stay with Richard and John.

[75] As to the second issue, I think it is in Daniel's best interests for the first overseas trip to take place after the summer holidays in 2011, and thus the 2-week staying contact will be in this country. The appropriate place to take Daniel for his first trip abroad would be to a suitable place in Europe.

[76] The third issue is whether the staying contact stays as for 2011, but in 2012 and thereafter to include trips to the USA where Richard and John have homes, not only in Massachusetts but also in Florida, or whether, as Richard wishes, Daniel's staying contact should in 2012 and thereafter compromise half of the half-terms and half the school holidays. As I have said, Emily and Frances see this as an issue of principle, not degree. Emily told me that Richard's proposals cross a line which was never contemplated. Frances told me that this proposal would drastically reduce her time with Daniel, given that she holds a very responsible job and is the breadwinner for the family. Mr Jackson submitted that this proposal is in reality a target for staying contact and that I should accept Dr Sturge's evidence, namely her concept of a benchmark at no more than 50 days per year.

[77] I am reluctant to be prescriptive about staying contact after 2011. In my judgment, these adults have got to work, through therapy if necessary, to restore as far as possible their previously harmonious relationship. There would be, as Dr Sturge said, much to be said for the situation in the future of the parties getting out diaries to see when it would be convenient to arrange staying contact for Daniel. Further, as Daniel gets older, he will inevitably have more and more of a say in staying contact, not only where it takes place, but also for how long.

[78] As to the point of 'principle', this I will defer until after I have decided parental responsibility to which I now turn.

Parental responsibility

[79] I have already set out its definition as per the Children Act 1989. At A4 of *Hershman and McFarlane: Children Law and Practice* (Jordan Publishing) the authors list some aspects of parental responsibility that have been acknowledged by the courts. They include determining the child's education, consenting (or not) to medical treatment, representing the child in legal proceedings, protecting and maintaining the child, administering the child's property, allowing the child to be interviewed, and allowing confidential information relating to the child to be published. The list illustrates the breadth of duties and/or responsibilities encompassed in 'parental responsibility'.

[80] Miss Hasan rightly drew my attention and very much relies on the well-known dicta of Ward LJ in *Re S (Parental Responsibility)* [1995] 2 FLR 648. Having reviewed the authorities, Ward LJ at 657 said this:

'It would therefore be helpful if the mother could think calmly about the limited circumstances when the exercise of true parental responsibility was likely to be ... with significance. It is wrong to place undue and therefore false emphasis on the rights and duties of the powers compromised in "parental responsibility" and not to concentrate on the fact that what is at issue is conferring upon a committed father the status of parenthood for which nature has already ordained he must bear responsibility. There seems to me to be all too frequently a failure to appreciate that the wide exercise of s 8 orders can control the abuse, if any, of the exercise of parental responsibility which is adverse to the welfare of the child. Those interferences with the day-to-day management of the child's life have nothing to do with whether or not this order should be allowed.

There is another important emphasis I would wish to make. I have heard, up and down the land, psychiatrists tell me how important it is children grow up with good self esteem and how much they need to have a favourable positive image of the absent parent. It seems to me important, therefore, wherever possible, to ensure that the law confers upon a committed father that stamp of approval, lest a child grow up with some belief that he is in some way disqualified from fulfilling his role and that the reason for the disqualification is something inherent which will be inherited by the child, making her struggle to find her own identity all the more fraught.'

Butler-Sloss LJ (as she then was) said this at 659:

'It is important for parents and it is important, indeed, for these parents to remember the emphasis placed by Parliament on the order which is applied for. It is that of duties and responsibilities as well as rights and powers. Indeed the order itself is entitled "parental responsibility". 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 fides reason for the application, ought, in a case such as the present, to assume the weight of those duties and cement that the commitment and attachment by sharing the responsibilities for the child with the mother.

This father is asking to assume that burden as well is that pleasure of looking after his child, a burden not lightly to be undertaken.’

[81] The factual matrix in which that decision took place was, of course, very different to that in the instant case. There, a couple, not married, had a child and then separated. Eventually staying contact came about between the father and his child. The father failed before the judge to obtain parental responsibility and appealed, in which he was successful. It is, in my judgment, implicit in both judgments to which I have referred in that case that the father was, and was seen by all to be, a parent of the child.

[82] There are two reported cases which have been drawn to my attention where one of a lesbian partnership has become a mother by means of donated sperm. Those two cases are *Re D (Contact and Parental Responsibility: Lesbian Mothers and Known Father)* [2006] EWHC 2 (Fam), [2006] 1 FCR 556, a decision of Black J; and *Re B (Role of Biological Father)* [2007] EWHC 1952 (Fam), [2008] 1 FLR 1015, a decision of Hedley J. In the first case parental responsibility was granted to the biological father, but hedged around with conditions. In the second parental responsibility was refused.

[83] Having analysed the evidence, Black J in *Re D* came to her conclusions at paras [86] and following. At paras [89] and [90] she said as follows:

‘[89] I confess that I have been anxious about whether making a parental responsibility order would be in D’s interests for the sort of reasons that have influenced Dr S, notably the potential threat to the stability of D’s immediate family from what I may loosely call “interference” from Mr B as well as the impact on society’s perception of the family if he were, in fact, to use it to become more visible in D’s life. On the other hand, I am very mindful of the authorities which stress the status aspect of parental responsibility and those which indicate that it is not appropriate to refuse to grant it because of a feared misuse which should more properly be controlled by s 8 orders. I am also mindful of the fact that such matters as those for which I have criticised Mr B in relation to his actions towards D’s family fall far short of the sort of activity that has, in the past, been seen as sufficient to found a refusal of parental responsibility ...

[90] The dilemma facing me has been greatly eased by Mr B’s offer to be bound by conditions which would prevent him from being intrusive in the obvious situations which might be anticipated as problem areas, namely D’s schooling and health care.’

[84] In *Re B* Hedley J analysed the evidence and then at paras [26] and [27] of his judgment said this:

‘[26] The court must, however, address the question of parental responsibility. It has become a somewhat hallowed process for the court to consider questions of commitment, attachment and motivation. However, as was pointed out in *Re H (Parental Responsibility)* [1998] 1 FLR 855 these applications remain subject to the overriding provision of Section 1(1) of the Children Act 1989. That is particularly important

where the case is outside the ordinary run of parental dispute on separation. TJ has certainly shown commitment and acceptable motivation and the contact sessions certainly do not preclude developing attachment. Yet this case is different. TJ accepts that CV and S should comprise the nuclear family and that he has no desire to undermine that and I accept the genuineness of that statement. It is, however, wholly inconsistent with the exercise of parental responsibility. Moreover, it is perceived by CV and S, for reasons which I have indicated I well understand, as a direct threat to their autonomy as a family unit. I am satisfied that it would be wholly contrary to the best interests of BA to grant TJ parental responsibility. TJ would undoubtedly seek to exercise it and forcefully to advance his views. CV and S would feel assailed and undermined in their status as parents. The inevitable resulting conflict would bode ill for BA.

[27] What then should the court do? Black J granted parental responsibility hedged about with conditions and undertakings. It is permissible to adjourn the application indefinitely. The court could dismiss it or pursuant to Section 1(5) of the Act make no order upon it. On the facts of this case I see no benefit in a restricted grant of parental responsibility. It will raise false hopes in TJ leading to frustration and will fuel all the fears of CV and S leading to conflict. Furthermore I see no basis for adjournment. As I have indicated I share the guardian's view that the matter should be resolved now. This family will derive no benefit from what will be perceived as a Damoclean sword suspended over them. On the other hand I am reluctant to dismiss the application for the essential conditions are fulfilled by TJ, it is simply that it will only work to BA's detriment in this case. Accordingly I have decided under Section 1(5) to make no order; it would certainly not be better for this child to make the order than not to make it – quite the reverse. That making of no order must be treated as a final order and, absent a radical change of circumstances, I cannot see the court revisiting this issue for many years, if at all.'

[85] It is thus apparent from the two authorities to which I have referred in cases similar to this, that the courts have been mindful of the authorities which stress the status aspect of parental responsibility. However, in my judgment, Hedley J, with respect, was correct to emphasise that parental responsibility applications remain subject to the overriding provisions of s 1(1) of the 1989 Act. I also agree with him that that is particularly important in a case 'outside the ordinary run of parental disputes on separation'. In my judgment, dicta from well-known decisions in what might be called 'conventional' or 'usual' parental responsibility applications do not readily transfer to cases such as the instant one. Nevertheless, I most emphatically do not ignore them.

[86] Whereas in the case of *Re B*, the father accepted that the lesbian civil partners should compromise the nuclear family, Richard most certainly does not. He asserts that he is in reality part of the one family, which compromises the four adults and Daniel. That, too, is John's view. Richard applies for parental responsibility because it was envisaged from the outset that he would be not only Daniel's father, but also a parent. He wishes to continue to be a parent and wants to acquire parental responsibility so that he has the legal

right, as he said on more than one occasion in his evidence, to be part of the decisions to be made about Daniel. He says he is committed and has always been committed, and has a close and loving relationship with Daniel. He wholly rejects the suggestion that Daniel's nuclear family compromises only Emily and Frances and, of course, Daniel.

[87] Dr Sturge was involved in both *Re D* and *Re B*. She told me in evidence that she in all been involved in four cases like the instant case – that is to say a lesbian couple with a child and a donating father who wants to be involved. She told me she saw the overall situation of Daniel having two families, not four parents.

[88] Initially in her evidence, when asked about her views as to Richard having parental responsibility, she said she had no comment but parental responsibility was not exactly the right concept to show his (that is Richard's) commitment to Daniel. She acknowledged that Richard had indeed a role to play, but not one that was on an equal footing with Emily and Frances. Daniel's needs, which were all important, was to belong, she said, to a nuclear family. That would provide security for Daniel, and clarity for what was in Daniel's best interests. As I have said, she told me that, in her opinion, Daniel saw Emily and Frances as his parents, namely those who looked after him and made decisions about him.

[89] As she said in her evidence, Daniel needed to know who is his nuclear family, shorthand for 'central', on a daily basis. He needed to see very clearly that his mother and co-parent were people who decided things, like where to go to school, and his father as someone who would comment but not being able to over-rule. It is important for Daniel to see that that is for his security and his clarity. She went on to say that, having interviewed Daniel and the four adults, she got some feeling of Daniel being insecure in his central home.

[90] Mr Jackson submitted that when all her evidence is looked at and considered, the effect of it really was to say that she did not think it was in Daniel's best interests for Richard to be granted parental responsibility. In my judgment, that is a fair submission.

[91] In my judgment, both Richard and John are, in asserting 'one family', in fact describing a situation they wish to come about and not the reality. I think their perception is inaccurate. In my judgment, the reality has been that since Daniel's birth he has been parented by Emily and Frances and that Richard, whilst being committed and loving to Daniel, is not undertaking the role of a parent. Daniel's nuclear or central family compromises Daniel, Emily and Frances. Not only have they cared for him on a day-to-day basis, but they have also taken all the decisions relating to his upbringing and welfare. I accept that they consulted Richard but the decision and responsibilities therefore are down to them.

[92] In my judgment, there is indeed a profound gulf in the perceptions between Richard and John on the one hand and Emily and Frances on the other hand. Richard does see himself as having equal importance to Emily and possibly greater importance than Frances. He does not accept the reality of the nuclear family, as I have found it to be, and erroneously refers to 'one family' of which he is part. He still sees the possibility of 'custody' if Emily were not able to care for Daniel. Further, and I come back here to the point of 'principle' regarding staying contact, Richard wants to look after Daniel for half his non-school time and thereby effectively set up an alternative home or

homes. Thus, overall, I agree that he is trying to equate the instant case with a post divorce or separation situation. In my judgment, each of these perceptions is mistaken.

[93] Furthermore, I accept both Emily and Frances's evidence that they have good reason to perceive the application for parental responsibility as being a direct threat to the autonomy of their family.

[94] Looking back at the history of this case, particularly from 2008 onwards, and taking into account the mistaken perceptions of Richard and of John, if parental responsibility were granted to Richard, it is likely that conflicts would arise. Richard protested during his evidence that he had no intention of 'rocking the boat' in the future, and that he would exercise his parental responsibility responsibly, acknowledging that Daniel's primary home is with Emily and Frances. I am afraid I do not share his confidence.

[95] His statement of 15 April 2009 does not really contain any solid basis explaining why he should be granted parental responsibility. He refers briefly to it (which basically relates to Frances being granted parental responsibility). It is thus unsurprising that Emily and Frances's then solicitors wrote on 17 June 2009 asking for details and clarification of Richard's intended role. The reply of 22 June 2009 contained the following passage:

'As litigation has started, our client would prefer to address his reasons for staying contact and parental responsibility at court.'

[96] During his evidence Richard referred many times to obtaining legal rights, but was unable to show how, in the light of Emily and Frances consulting him on every important decision (save, of course, that of Frances being granted parental responsibility) he would be, practically speaking, in a better position than he was or had been in respect of Daniel's welfare and upbringing or would lead to better decision-making. That is particularly pertinent in the light of the evidence given by Emily and Frances, which I accept, that they will go on consulting him about important matters in Daniel's life.

[97] Miss Hasan in her opening position statement identified what she submitted were 'the real issues':

(a) Is it in Daniel's interests on these specific facts for his blood father to be legally recognised?

(b) Should the father have the ability to make decisions for Daniel on those occasions that they are together – for instance if he has to go to hospital as a matter of emergency?

(c) Would it benefit Daniel to know that his father has that ability?

(d) Does it legitimise what Daniel really knows, that his father is Richard and Frances is "mummy's wife" and decisions can be made by both?

[98] As to the first matter, it is my judgment that Richard's position as Daniel's father is already recognised by Emily and Frances. Furthermore, because in 2001/02 Emily was unmarried and Emily and Richard were provided with licensed treatment services Daniel's father is Richard – s 28(3)

of the Human Fertilisation and Embryology Act 1990. Daniel's parentage is not in doubt. The relationship of Daniel and Richard can be fully promoted through contact arrangements.

[99] As to the second matter, in my judgment, that can be provided for under s 3(5) of the 1989 Act, which provides:

'A person who—

- (a) does not have parental responsibility for the child; but
- (b) has care of the child

may (subject to the provisions of this Act) do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare.'

[100] As to the third and fourth matters raised by Miss Hasan, I have already referred to paragraphs in Dr Sturge's written and oral evidence which, in my judgment, answer them.

[101] Both Emily and Frances expressed considerable apprehension, indeed alarm, at the prospect of Richard being granted parental responsibility. Frances put in her evidence that it would make life impossible having to take decisions with Richard, who she feels does not really respect Emily and thinks of her, that is Frances, as peripheral. Emily said that she found the notion of Richard being granted parental responsibility immensely distressing and it went to the heart of their nuclear family. It would be overwhelmingly more likely that there would be scope for battles between her and Richard. Richard firmly denied that that was likely or was a risk. I have to say I disagree with Richard.

[102] I do not want to say more about the characters or personalities of the four adults than is absolutely necessary to explain my reasoning. I am acutely aware that powerful adjectives used in judgments to describe litigants in family disputes, where those litigants must continue to promote the future welfare of the child in question, may do more harm than good. I simply say that I was impressed with Emily and Frances. Their appreciation and analysis of the overall situation concerning Daniel was well thought out and described the reality. Richard strove to tell me what he saw the overall position to be, but as I have said, I consider his perception to be flawed. Although I was impressed with the quiet, thoughtful John in the witness box, he, of course, could not be otherwise than intensely loyal to Richard. I have to say that I think his perception too is flawed.

[103] Accordingly, in my judgment, I am of the opinion that the grant of parental responsibility to Richard is not in Daniel's best interests for the reason I have sought to give. I propose to make no order upon the application, but to say that I consider that that is a final order, and, like Hedley J, in *Re B* will not be revisited unless some exceptional circumstance arises.

[104] Finally, to return again to Richard's proposals for contact in 2012 and beyond, if I were to make such orders, in my judgment, that would give out an entirely wrong message to everybody, including Daniel, namely that half of Daniel's non-school time would be spent with Richard. Furthermore, his proposals would seriously curtail Frances's free time with Daniel.

[105] I shall make the orders for contact for 2010 and 2011, but say that thereafter staying contact is to be agreed between the parties on the basis of no more than 50 days per year, as suggested by Dr Sturge.

[106] For completeness sake, I should say that I have, of course, read the statements of the witnesses in support of Richard's case and that in support of Emily and Frances. I am grateful for their help but what they say does not really impact on the issues that I have to decide.

Order accordingly.

Solicitors: *Glazer Delmar* for the applicant
Manches for the respondents

PHILIPPA JOHNSON
Law Reporter

