IN THE SUPREME COURT OF JUDICATURE
94/1175/F
COURT OF APPEAL (FAMILY DIVISION)
(MR JUSTICE EWBANK)

Royal Courts of Justice
Strand
London WC2

Thursday, 16th February 1995

B e f o r e :

LORD JUSTICE BUTLER-SLOSS

LORD JUSTICE SIMON BROWN

and

LORD JUSTICE WARD

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RE S(MINORS)
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(Computer Aided Transcript of the Stenograph Notes of John Larking, Chancery House, Chancery Lane, London WC2
Telephone No: 071 404 7464
Official Shorthand Writers to the Court)

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MR A DAVIES (instructed by Messrs Steel and Shamash, London SE1 7AA) appeared on behalf of the Appellant

MR K HOTTEN (instructed by Messrs Bond Lewis and Company, Balham) appeared on behalf of the Respondent.

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J U D G M E N T
(as approved)
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Thursday, 16th February 1995

LORD JUSTICE WARD: This is an appeal from the Order of Her Honour Judge Pearlman, made on 15th July 1994, when she refused a father's application for a Parental Responsibility Order. The material facts of this case shortly stated are these: the mother and father commenced their relationship some time in about August 1985 and they lived together in the father's flat. It was on 8th January 1988 that their daughter was born. It is not a fact without significance, in my judgment, that this child was registered in the surname of the father. The implication from that is that mother recognised at that time that it was right and proper that it be acknowledged in law as in fact that he was the father. He joined with the mother in signing the register accordingly.

This couple, who were committed in their relationship to each other were, at one stage, of a mind to marry. They lived as man and wife and as man and wife they purchased a flat in their joint names, a token of their mutual affection and respect. Sadly it was a relationship which failed to prosper and by July 1989 it had broken down and the parties separated, with the father leaving the mother and daughter in that flat whilst he moved to live with his parents. He was not feckless. He paid the mother some £500 a

month intended partly to cover half of the mortgage repayments and the related endowment policy, and partly to provide for the maintenance and nursery school fees of the child. He honoured his obligations apart from an occasion of some three months duration, at the end of 1990 into the spring of 1991, when he was out of work and unable to maintain those maintenance payments.

This case hinges upon the events that occurred in the summer of 1990. It was then that the father was arrested and in due time stood trial on two counts of possession of obscene literature. The learned judge described his involvement in that appalling activity in these terms. She said:

> "...I do not have any details from the Crown Court, nor have I a transcript of the prosecution opening, nor indeed of the trial judge's sentencing remarks. On the father's evidence, he says that when he was going through the advertisements of a magazine called "Look". There was one from Brazil. He did not tell me what the advertisement was but he said he wrote off and got a reply. In that reply there were three photographs of young girls which he admitted were paedophilic in nature. He said 'I was shocked.' He said 'I requested more information so I could see if they were running a business in this country, so I got a second package containing a few more photographs. The third package, all of a similar nature, came unrequested containing some 20 pictures. Those were the photographs, the third package, that were intercepted by Customs and Excise en route to me."

He pleaded guilty to the offences for which he stood his trial. He was apparently able to make some use of a statement, which had been signed by the mother with

appropriate warnings to ensure its accuracy, in which she stated, amongst other things, this:

> "Although [father] and I have lived apart for several months we have remained on amicable terms and continue to see each other regularly. He has shown himself to be a capable and responsible father who has developed a warm and caring relationship with his daughter."

She went on to speak of his trustworthiness, but it may be, I express no concluded view about this, that at the time her tongue was somewhat in cheek in paying that tribute to him, for the fact is that understandably enough she was deeply shocked and horrified by his indulging in this pernicious trade. It has affected her relationship with him and is now at the root of her objection to his having the Parental Responsibility Order which he seeks. It is material to recite the findings of the judge in this connection. She said this:

> "In so far as those matters are concerned, all these matters occurred at a time after [the child] was born and they are grave matters."

I totally agree. She continued:

> "I have to say that I do not think that the father, by the nature of his evidence, begins to understand or indeed to have any remorse for being in possession of this type of material, or to understand the importance that his possession of this material has had on the mother."

I emphasise that her reference was to the importance it had on the mother. There was no reference to the effect it had on the child. She continued:

> "I have to say that it is, it seems to me, an important matter that I have to weigh in deciding

whether or not to make an order for parental responsibility."

After that conviction this mother was both upset and confused. That is wholly understandable. What she undoubtedly would have asked herself was "What are the implications of this conviction for the safety of my daughter? Is this man, whom I once wished to marry, engaged in some paedophilic activities which will bring harm to my child?" Those were all totally natural and proper responses. Her reaction was to sever the contact which hitherto he had enjoyed not only to his pleasure, but also moreover to the undisputed benefit of their daughter. The cessation of contact produced a dramatic effect in the child. She became deeply distressed, and her behaviour at school deteriorated so that the mother had to acknowledge that the attachment of this child to her father was so great that its impairment was detrimental to the welfare of the child. Consequently the contact resumed, though mother was careful herself to supervise that continuing contact.

As the months went by mother gradually relaxed the extent to which she did supervise father, minute by minute or day by day. The contact gradually became unsupervised. In May of 1992 the tension between the parents had now reached a point such that the father brought the application, which is on appeal to us, namely, for a Parental Responsibility Order and he

also sought the definition of the contact he was having to his daughter. That application for definition of contact duly proceeded through the court as the practice required. It led to a conciliation appointment being held in August. That led to the agreement that contact should be afforded on Saturdays from 11am to 6pm. But it was apparent that all the difficulties had not been resolved and the conciliation appointment was accordingly adjourned. There were, in fact, four further appearances before the District Judge and the conciliating Welfare Officer. Those meetings resulted, in December of 1993, in the court making no Order under the provisions of section 1(5) of the Children Act, because it was by then apparent that the parents were agreed that contact had to continue. It had to continue without conditions being imposed upon it as to what, if any, supervision there was to be made of the father's contact with the child. The mother may have drawn comfort from the fact that to her knowledge the father's new lady-friend, who happened to be a trusted friend of hers, would invariably be at home for most of the time that the father would have the child visit him.

Moreover, as this contact developed into staying contact, one weekend in three, she could derive further comfort from the fact that the staying contact tended to occur at the grandparents' house and they,

too, could keep an eye on the situation. She had taken the sensible precaution of, I hope, delicately but positively informing her daughter of the dangers of sexual abuse and had begun to teach her some skills in self-protection. The point is that no restraint was imposed by the court on the freedom of contact.

So far as the history is concerned, I continue to recite these bare facts: in January of 1993 the father again ran into some financial difficulty which made it impossible for him to continue to pay the nursery school fees. The parties were, at that stage, negotiating about the home in which they had lived and they resolved that by father paying out the mother's share, moving back into the property and thereafter paying maintenance to the mother for the child at rates which were agreed. In due time the Child Support Agency got its long tentacles into the father, as a result of which he has been required to pay, and has paid, substantially increased monies to the mother for the child. He has done so faithfully, however unhappily.

Those were the bare facts which came before the court. The learned judge polarised the issue at the beginning of her judgment by pointing out that the mother's case rested on two grounds. The first she rightly described as minor, which was his relative unreliability with regard to money. She dealt very shortly with that point; it has no substance. He has

at all times done his best to honour his obligations both to the mother and to the child. He has certainly not failed to a degree which is of any relevance in the context of this application. The most important issue, said the learned judge, was the effect of his conviction. His case was stated to be this:

> "... he is very fond of this little girl, that he has always paid money for her, that he takes her out regularly, he has regular contact and that he is thoroughly committed to her."

Nonetheless, she refused the Order.

At the risk of being tedious, it may be necessary for me to recite some of the principles on which these applications ought to be judged. The case of D v. Hereford and Worcester County Counsel [1991] Fam 14 was, I believe, the first of this kind of application and it happened to come before me. I endeavoured to explain my understanding of the precursor to section 4 of the Children Act, namely section 4 of the Family Law Reform Act 1987 which gave the power to grant parental rights, as it was phrased, in the language of the day. I endeavoured to explain how the Law Commission had wrestled over a number of years and in a number of reports, with the dilemmas that the question posed seen against the background that it was right and proper in this day and age to sweep aside those distinctions between legitimacy and illegitimacy which bore unfavourably upon the children.

The logic would have suggested that one should also sweep away any disability that remained vested in the father of the illegitimate child. Since science could conclusively determine the fact of fatherhood the concept of filius nullius was no longer one which could command respect. But there are obvious difficulties, which the Law Commission recognised, in giving a total equality of status to the father who has married the mother, and to the putative father who had not. At its most emotive, but nonetheless pertinent point of distinction, it would cause offence to right-thinking people that the rapist should claim parental rights or parental responsibilities over the child which that criminal act produced. That led to the Commission entertaining the debate as to whether or not they should do what I believe may have been done in Scotland, that is to say, to confer parental responsibility on the father but with a right upon the mother to apply to disenfranchise him. They grappled with the concept of defining an irresponsible father who should not be afforded this status and eventually they left it to the court to decide. In the language of the Act, section 4 provides that:

> "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..."

No guidance is given as to how the court should

approach the exercise of that broad discretion given to it. My puny efforts to provide that guidance in the case of D v. Hereford and Worcester was distilled and approved by the Court of Appeal in the first important case on this subject. It is Re H (Minors) (Local Authority: Parental Rights) (No 3) [1991] Fam 151. Balcombe LJ described the effect of the law and the reforms that the Family Law Reform Act 1987 had made in these terms: the whole purpose of the Act of 1977, which as was stated in its preamble was to reform the law relating to the consequences of birth outside marriage, had as its undoubted aim in an appropriate case to equate the position of the father of the child born out of wedlock to that of the father of a legitimate child.

He suggested, and most helpfully, this test is at page 158 D:

> "In considering whether to make an order under section 4 of the Act of 1987 the court will have to take into account a number of factors of which the following will undoubtedly be material (although there may well be others as the list is not intended to be exhaustive): (1) the degree of commitment which the father has shown towards the child; (2) the degree of attachment which exists between the father and the child, and (3) the reasons of the father for applying for the order. "

There followed the case of Re C (Minors) (Parental Rights) [1992] 1 F.L.R. 1. This is another judgment often cited for the eloquent words of Waite J, as he then was. He was there dealing with the problem of how parental rights were to be enforced and what would

happen if it was not possible fully to enforce them.

He said at page 3:

> "Given, therefore, that the prospective enforceability of parental rights is a relevant consideration for a judge in deciding whether or not to grant them, there is, in our judgment, nothing in the Act to suggest that it should be an overriding consideration. It would be quite wrong, in our view, to assume that just because few or none of the parental rights happen to be enforceable under conditions prevailing at the date of the application, it would necessarily follow as a matter of course that a PRO [Parental Rights Order] would be refused. That can be illustrated by looking - as the legislation clearly requires one to look - at the position of a lawful father in analogous circumstances. Conditions may arise (for example, in cases of mental illness) where a married father has, regretfully, to be ordered, in effect, to step out of his childrens' lives altogether. In such a case, his legal status as a parent remains wholly unaffected, and he retains all his rights in law, although none of them may be exercisable in practice. This does not mean that his parental status becomes a dead letter or a mere paper title. It will have real and tangible value, not only as something he can cherish for the sake of his own peace of mind, but also as a status carrying with it rights in waiting, which it may be possible to call into play when circumstances change with the passage of time. It is not difficult to imagine situations in which similar considerations would apply in the case of a natural father. Though existing circumstances may demand that his children see or hear nothing of him, and that he should have no influence upon the course of their lives for the time being, their welfare may require that if circumstances change he should be reintroduced as a presence, or at least as an influence, in their lives. In such a case a PRO [Parental Rights Order] notwithstanding that only a few or even none of the rights under it may currently be exercisable, may be of value to him and also of potential value to the children."

He set out, later, his test in similar terms to that of Balcombe LJ in these words:

> "... was the association between the parties sufficiently enduring, and has the father by his conduct during and since the application shown

> sufficient commitment to the children, to justify giving the father a legal status equivalent to that which he would have enjoyed if the parties had been married, due attention being paid to the fact that a number of his parental rights would, if conferred on him by a PRO [Parental Rights Order] be unenforceable under current conditions?"

It is, therefore, important to observe the interrelation between the rights and the status and the exercise of those rights and, of course, the restrictions upon exercise of those rights. Re H (A Minor) (Parental Responsibility) [1993] 1 FLR 484 was another case where, although contact had been denied yet the question posed by Waite J, in the passage I have just read, was answered affirmatively by the court and parental responsibility was granted. Waite J gave more guidance in Re CB (A Minor) (Parental Responsibility Order) [1993] 1 FLR 920, where he allowed an appeal from justices who fell into error in subordinating any independent assessment of the father's parental responsibility application on its merits to the demands of ensuring, in that case, the successful rehabilitation of the child to the mother which was so crucially important for that particular child. He said:

> "Whether this natural father should or should not be given a status equivalent to that of a marital parent is one question. Whether this child should be the subject of a phased programme of rehabilitation to her mother is another. The two questions are not, of course, wholly irrelevant to each other, and each has to be answered according to the best interests of [the child] as the paramount consideration. They are, however, entirely separate and distinct questions, to be examined from quite different perspectives. By

> failing to appreciate that, the magistrates disabled themselves from giving a proper consideration to the merits of granting the father a lawful father's status here and now, regardless of what the future might be intended to hold for any eventual return of the child to the mother."

Re T (A Minor) (Parental Responsibility: Contact) [1993] 2 F.L.R. 450 was one of the few cases where a refusal of the Parental Responsibility Order was upheld. It is instructive to take some note of the facts of that particular case. There the mother and father separated during the mother's pregnancy. The cause of the separation was a totally violent assault by the father on the mother, so severe that he had to take her to hospital. He was utterly feckless in his payment of maintenance. He was a man of unbridled hostility, who head-butted the mother on another occasion when one of the few attempts to arrange contact dissolved into this violence. He abducted the little girl from the mother for a period of days, which was an act rightly described by my Lady, Butler-Sloss LJ, as cruel and callous behaviour in respect of a young child, with no thought for her welfare.

It is not surprising, in those circumstances, that the judge below, Ewbank J, found that he had no worthwhile part whatever to play in the life of this child and declined to afford him parental rights. Later Eastham J denied him all his contact and debarred him under section 91(4) of making any further

application. That gives a clue to the nature of the beast in that particular case.

Another case where parental responsibility was refused was W v. Ealing London Borough Council [1993] 2 F.L.R. 788 in which my Lord, Simon Brown LJ, was a member of the court giving the judgment of the court. In that case the father's conduct was so outrageous that his attempt to apply for a Residence Order, in respect of the child in care, was dismissed without being heard on its merits. The application he made for parental responsibility was one which was also dismissed because at that stage the children were prepared for a termination of their contact to their parents, the introductions to their prospective adopters were imminent and to change that would have left the children in limbo and confused. The Court of Appeal found that, in truth,

> "Only the real reason he could have for making the application under the Children Act was the hope that he might thereby thwart the making of an adoption order."

That seems to me, as I understand that judgment, to strike at the heart of his bona fides and to the genuineness of his commitment to that child. The decision is wholly right, if I may so respectfully say so.

In Re G (A Minor) (Parental Responsibility Order) [1994] 1 F.L.R. 504, again a decision of the Court of

Appeal, Balcombe LJ at page 508 said this, endorsing observations of my Lady, Butler-Sloss LJ in Re T, which I have already referred to:

> "... I am quite prepared to accept that the making of a parental responsibility order requires the judge to adopt the welfare principle as the paramount consideration. But having said that, I should add that, of course, it is well established by authority that, other things being equal, it is always to a child's welfare to know, and wherever possible, to have contact with both its parents, including the parent with whom it is not normally resident if the parents have separated. Therefore, prima facie, it must necessarily also be for the child's benefit or welfare that it has an absent parent sufficiently concerned and interested to want to have a parental responsibility order. In other words, I would approach this question on the basis that where you have a concerned although absent father, who fulfils the other test about which I spoke in Re H, namely, having shown a degree of commitment towards the child, it being established that there is a degree of attachment between the father and the child, and that his reasons for applying for the order are not demonstrably improper or wrong, then prime facie it would be for the welfare of the child that such an order should be made."

The next in this long litany is a judgment of first instance, a judgment of Wilson J in Re P (A Minor) (Parental Responsibility Order) [1994] 1 F.L.R. 578. There the justices had decided that a Parental Responsibility Order might be used by the father to question aspects of the child's upbringing which would normally remain in the domain solely of the person with day-to-day care. As to that Wilson J said this:

> "It is important to be quite clear than an order for parental responsibility to the father does not give him a right to interfere in matters within the day-to-day management of the child's life...
> It is to be noted that on any view an order for parental responsibility gives the father no power

to override the decision of the mother who already has such responsibility: in the event of disagreement between them on a specific issue relating to the child, the court will have to resolve it. If the father were to seek to misuse the rights given him under s 4 such misuse could, as a second to last resort, be controlled by the court under a prohibited steps order against him and/or a specific issue order. The very last resort of all would presumably be the discharge of the parental responsibility order. But, on the evidence before the magistrates, and indeed on the basis of their conclusion as to the father's fitness to continue to care responsibly for the child during regular and extensive periods of contact in the future, there seems to be no basis for such extremely pessimistic hypotheses, which I mention only for the sake of completeness."

The final case is that of Re E (A Minor) Parental Responsibility [1994] 2 Family Court Reporter 709. The Court of Appeal there held in the judgment of Balcombe LJ:-

"I would certainly approach any application for a parental responsibility order under the Children Act 1989 by a father who has shown the degree of attachment and commitment to his child as this father has shown to C on the basis that such an order would be prima facie for the welfare of the child. I would require to be convinced by cogent evidence that the child's welfare would be adversely affected by the making of such an order...

It does seem to me that there was here no valid ground whatsoever for refusing the parental responsibility order, bearing in mind the approach which I believe is the correct one, namely that in a case such as the present, where there has been constant commitment by the father to C since her birth; regular contact; and I should add financial provision made as well - although the precise amount of that is subsequently to be considered by the court, nevertheless there is no suggestion that the father has failed to make financial provision tor C - it must be prima facie in C's welfare that a parental responsibility order be made in favour of this committed father, and certainly the matters to which the Judge referred to do not provide anything like the contra-indication which

> would be necessary, in my view, to show that such an order is contrary to her welfare."

I have engaged in this laborious review of the authorities because it is my increasing concern, both from the very fact that there are so many reported cases on this topic and from my experience when dealing with the innumerable appeals from justices to the Family Division, that applications under section 4 have become one of these little growth industries born of misunderstanding. Misunderstanding arises from a failure to appreciate that, in essence, the granting of a Parental Responsibility Order is the granting of status. It is unfortunate that the notion of "parental responsibility" has still to be defined by section 3 of the Children Act to mean "all the rights, duties, powers, responsibilities and authorities which by law a parent has in relation to a child and his property," which gives out-moded pre-eminence to the "rights" which are conferred. That it is unfortunate is demostrated by the very fact that, when pressed in this case to define nature and effect of the order which was so vigorously opposed, counsel, for the mother, was driven to say that her rooted objection was to the rights to which it would entitle the father and power that it would give to him. That is a most unfortunate failure to appreciate the significant change that the Act has brought about where the emphasis is to move away from rights and to

concentrate on responsibilities. She did not doubt, that if by unhappy chance this child falls ill whilst she was abroad, his father if then enjoying contact, would not deal responsibly with her welfare.

It would, therefore, be helpful if the mother could think calmly about the limited circumstances when the exercise of true parental responsibility is likely to be of practical significance. It is wrong to place undue and therefore false emphasis on the rights and duties and the powers comprised 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 that he must bear responsibility. There seems to me to be all too frequently a failure to appreciate that the wide exercise of section 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 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 that 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 the 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.

Trying, therefore, to apply those principles to this case, at the heart of it lies the finding by the learned judge that in terms of commitment, attachment and bone fides this father passed the test. She rightly stated that that was not the conclusive list of requirements, and she rightly had regard to the fact of his conviction. But it seems to me that however disreputable the conviction, it was not one which demonstrably and directly affected the child in her day-to-day life. The learned judge said this:

> "I do accept mother's evidence that the contact she has agreed to is such that she ensures the child will not be alone with her father if at all possible. If I make an order for parental responsibility, this would give the father all the parental rights and duties set out in the Act that the mother has. It would give him scope to interfere in many different ways with the present arrangements for the child and it would also, it seems to me, looking at these parties and what has gone on in the past, be liable to increase the proceedings and so unsettle the child."

In my judgment the learned judge has failed to appreciate that the scope to interfere, as Waite LJ and Wilson J have explained, is not material to the

issue here, especially since there is, it seems, a paucity of evidence to justify that finding. Moreover, the learned judge, in looking at the contact, has failed to appreciate that the contact application had been before the court and no conditions of supervision were imposed upon the exercise of it by father. The liability to increase proceedings and to unsettle Jasmine arise not from the grant or refusal of parental responsibility and the conferring status on the father, but the mother's anxieties arising out of contact, and section 8 and conditions that may be imposed under section 11 deal with those difficulties. When the learned judge dealt with welfare she dealt with it in a way that leaves me uncertain how she, in fact, approached that important question. She said this:

> "It would also mean that he would be free to arrange contact with Jasmine and indeed with her friends if she asked her friends to come along, and that is bound to be a matter that would happen as Jasmine gets older. It would be open to him to arrange for contact in different circumstances to those referred to by the mother. It seems to me that when I have to look at the welfare of the child, I have to look at the child living normally in the family home. At the moment there is no reason at all why, apart from the fact that the mother says she finds it difficult by reason of these proceedings for Jasmine to have friends over, although there is one child who comes over, it is the right of the child to invite her friends over. If I make an order for parental responsibility it would mean also that Jasmine would invite friends over into wherever the father takes her, and the contact would be totally unfettered and unsupervised.
>
> When I look at the question of Jasmine's welfare, being the court's paramount consideration, and I look at all these matters, I come to the conclusion that an order for parental

> responsibility to the father would not be the best interests of Jasmine, and in those circumstances this application is dismissed."

I find it difficult to see how the little child's freedom to invite her friends to her father's house is adverse to her best interests. I do not, I confess, understand what she finds to be adverse to the best interests in those arrangements and I fear she has wholly failed to appreciate the emphasis that Balcombe LJ placed upon children growing up in the knowledge that their father is committed enough to wish to have parental responsibility conferred upon him. Given the commitment, the attachment, the affection that is plain and uncontroverted in this case, it seems to me that this is, indeed, the case where the father, who has the burden of proof upon him, has abundantly satisfied it and where there is no cogent reason, and, in my judgment, little reason at all, for refusing the Order which he seeks. I would therefore allow the appeal.

LORD JUSTICE SIMON BROWN: I agree.

LADY JUSTICE BUTLER-SLOSS: I also agree. I agree with the judgment of Ward LJ and would add just a few words in a matter which deserves a little conversation as, indeed, it has been given amply by my Lord.

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 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.

In my judgment, this father should be allowed to share the burden of caring for his daughter which does not remove from the mother the day-to-day control of her daughter's welfare. But it gives to the father the status in which he can share in the responsibility for the child's upbringing and demonstrate that he will be as good a parent as he can make himself to this little girl. I, too, would allow this appeal. Consequently the appeal is allowed. Paragraph 3 of the Order of 15th July 1994 is set aside and there will be substituted:"It is ordered that the father do have parental responsibility for the child Jasmine". Is everybody Legally Aided?

Order: No order for costs save Legal Aid Taxation.