

Transgender parent faces religious objections to contact (J v B and others)

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Family analysis: What approach will the court take to an application by a transgender parent for contact in light of religious objections? Lyndsey Sambrooks-Wright, barrister at 2 Dr Johnson's Buildings, considers the decision in *J v B and others*.

Original news

J v B and others [2017] EWFC 4, [2017] All ER (D) 108 (Jan)

The Family Court refused the applicant transgender father's application for direct contact with her five children who belonged to the Charedi Jewish community. The likelihood of the children and their mother being marginalised or excluded by the ultra-Orthodox community was so real, and the consequences so great, that that one factor, despite its many disadvantages, had to prevail over the many advantages of contact.

Briefly, what was the background to this case?

These proceedings relate to the father's application for contact with the parties' five children, ranging in age from two to 12 years old. The issues in the case also revolve around the North Manchester Charedi Jewish community in which the parents have brought up the children.

The father left the marriage and the community in June 2015 in order to live as a transgender person and had no contact with the children since that time, whether direct or indirect. Peter Jackson J sets out in terms that the ultra-Orthodox community within which the children reside are the reason why contact was terminated in 2015.

The father applied for contact in January 2016 and the children were joined as parties in February 2016. The matter was transferred to the High Court in June 2016, with a final hearing in November 2016. During proceedings, a number of professionals were involved including the Anna Freud Centre in London and a counsellor for the oldest child. Both parents also called a number of witnesses from the immediate and wider Charedi community, who gave evidence on the likely outlook for the children should contact resume and Charedi community policies.

What were the key issues?

The key issue in this case was whether the father could resume contact with the children and, if so, how this could be managed. The father had been living as a woman since her departure from the community and was considering her options in respect of gender reassignment surgery at the time of this case. All of the children expressed a wish to see their father again, save for the youngest child (due to her age) and the oldest child, A.

The matter was somewhat complicated by photographs shown to A by the father, showing male friends dressed as women. This was done to introduce A to the concept of the father's gender dysphoria but was accepted to have had a negative impact on A, particularly within the confines of a community that does not allow access to social media or television and has strong views on issues pertaining to sexuality. There were concerns regarding the father's ability to maintain emotional stability should contact take place.

Issues were also raised in relation to domestic abuse perpetrated by the mother on the father and sexual abuse of the children by the father. It was determined that there was no credible evidence supporting the allegation that the father sexually abused any of the children and the issues of domestic abuse were not deemed necessary for determination.

What did the court decide, and does the judgment clarify the law in this area?

This case is of some interest to anyone involved in proceedings whereby religious objections are raised, as well as for practitioners representing a transgendered client. The court determined that the father's application for direct contact should be refused and an order for indirect contact made, to take place four times a year.

A family assistance order for 12 months, addressed to CAFCASS, was also put in place to assist with the introduction of indirect contact. Life story work was to be undertaken with the children to assist them in understanding their father's transition, with the Anna Freud Centre advising on the creation of the narrative.

Having weighed up the consequences of contact or a lack of contact with their father, Peter Jackson J determined that the likelihood of the children and their mother being marginalised or excluded by the ultra-Orthodox community is 'so real, and the consequences so great, that this one factor, despite its many disadvantages, must prevail over the many advantages of contact' (para [187]).

Peter Jackson J also noted the importance under Article 8 of the United Nations Convention on the Rights of the Child of the children preserving their identity, a matter of 'particular pride' to these children (para [185]).

To what extent did the court rely on the 'child's voice' in this case?

The children met with the guardian and their wishes are duly recorded in the judgment. The guardian also met with A separately in the company of his counsellor. The younger children expressed a view to see their father, albeit a view complicated by being unaware of the changes that the father had undergone. Their wishes were dealt with briefly within the judgment and were not followed.

Appropriately in a case of this nature, particularly given the age and strong views of A, the judge met with A to ascertain his views at court. This meeting took place in the presence of the guardian and the judge's clerk and was noted not to be for the purpose of obtaining evidence but to allow A to better understand the court process. Peter Jackson J acknowledged however that 'inevitably, a meeting with a child can also provide an additional perspective for the judge, and so it proved'.

No further information is provided as to the duration or nature of the meeting but A's views were set down within the judgment, namely his opposition to contact at this stage and his conflicted views in relation to these proceedings. It does not appear that the advocates raised objections to this approach.

What did the court have to say about the rights of transgender parents?

Re C [2006] EWCA 1765 and *Re T* [2008] EWCA Civ 85 were considered, both of which relate to transgender parents seeking contact. The authorities are scarce in this area and provide relatively little guidance in a case further complicated by prevailing religious considerations. Both cases do however 'emphasise the importance for children to have skilled help in learning about their father's transition so that they can adjust to the change and if possible maintain a relationship', an approach which appears to have been endorsed in this matter but not ultimately followed.

The professionals involved in this matter were unanimous that the harm to the children, if ostracised from the community, would outweigh that of losing their relationship with their father. The mother acknowledged that the children had previously had a loving relationship with their father but opposed any further contact taking place. While it may be possible to distinguish *J v B and others* on the grounds of its unique factual matrix, this authority sadly adds to the bleak outlook of case law in this area for the prospects of transgender parents seeking contact.

It appears to have been argued during the course of proceedings that, according to the principles of the North Manchester Charedi Jewish community, transgenderism is a sin. Transgenderism is instead, appropriately, described by Peter Jackson J as a 'right, as is the right to follow one's religion'. The rights of transgender people are not dealt with in great detail within the judgment but relevant gender recognition legislation is summarised (para [44]), as is equality legislation (para [46]). It is noted that the case must not be considered only through 'an ultra-Orthodox lens' (para [163]), gender dysphoria also requiring careful consideration.

What should family practitioners take away from this case?

While Peter Jackson J made clear that this is not a case about whether or not children should be brought up according to ultra-Orthodox principles, both parties having agreed that the children should remain living within the community, the case relies heavily on religious objections to contact and provides helpful guidance in that area.

While little positive guidance for those representing transgender parents may be gleaned from the judgment, the judge was clear that the children were ‘goodhearted and adaptable and, given sensitive support, I am sure that these children could adapt considerably to the changes in their father. The truth is that for the children to see their father would be too much for the adults’ (para [181]), which seemingly supports the prospect of direct contact taking place in other scenarios without additional complicating factors.

Peter Jackson J was careful to note that this was ‘not a failure to uphold transgender rights, still less a “win” for the community, but the upholding of the rights of the children to have the least harmful outcome in a situation not of their making’ (para [189]). Those advising transgender clients may nonetheless struggle to view the judgment with particular optimism.

Are there any other points of interest?

Peter Jackson J was effectively asked to make a determination as to whether the outlook of the community was consistent with current human rights and equality legislation. He has largely declined to do so.

Lyndsey is regularly instructed in all areas of family law including public law, private law and applications for injunctive relief. She has experience in the Court of Appeal, High Court, county courts and family proceedings court, representing local authorities, guardians and parents. Lyndsey also deals with cases heard in the Court of Protection.

Interviewed by Kate Beaumont.

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