

## Archer v Titchener

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After the not-guilty verdict in the case of R v Titchener, Rob reminded Helen that 'as long as we have a child together, you'll never be rid of me.' Although Rob is wrong about many things, he is right that he and Helen remain connected by virtue of their son.

When relationships break down and children are involved, couples sometimes have to rely on the Family Court to help them make suitable arrangements for the children they share. This article explains some of the legal issues in the family court that are raised by the Archer v Titchener case. In addition to being Archers fans, we are also family law barristers who specialise in the law relating to children. We deal with similar cases to Rob's and Helen's every day.

To start with, it is important to say that most separating couples are able to agree arrangements for their children either between themselves or through mediation, both of which offer more flexible solutions than court orders. Mediation is a good option when couples are still able to be in the same room with each other but--in a situation where there has been a history of domestic violence and also criminal proceedings where one person in the couple has injured the other--sometimes mediation is not appropriate.

The family court in this case considered issues that fall under section 8 of the Children Act 1989. In particular, it decided with whom Henry and Jack should live, and how much time they should spend with the non-residential parent. In all family law cases, the welfare of the child is the court's paramount consideration. Although Helen and Rob's relationship has ended in spectacular fashion, the family court will aim to find an arrangement that promotes Henry's and Jack's best interests.

Initially, during Helen's imprisonment, an application was made by Pat and Tony to the family court for an order that Henry should live with them. They were unsuccessful in their application because it was held to be in Henry's best interests to live with the only other person who had parental responsibility for him. The order in relation to Henry was granted on an interim basis, in other words as a kind of holding position until a final order is made. The issue for the family court was (a) whether Henry should continue to live with Rob or whether he should live with Helen; (b) regardless of where he lives, how much time should he spend with the other parent; (c) where should Jack live and how much time should he spend with the other parent. Rob may have also tried to raise the issue of Jack's name.

This storyline touches on a number of the often complicated issues family courts and lawyers grapple with daily, and below we explore:

1. Henry's status, Rob's relationship to him (and what might have happened if Ian had been Henry's father by artificial insemination)
2. The approach of a family court where one parent has been acquitted of a serious crime
3. The relevance of domestic abuse
4. Will Rob be able to change Jack's name to Gideon Titchener?

## 5. What might the future hold?

### 1. Henry's status and Rob's relationship to him

*Henry's status: Conceived by artificial insemination in a clinic*

Helen made the decision to conceive Henry as a single parent without any partner using a fertility clinic so he has one legal parent, his mother Helen, and no legal father as the donor is currently anonymous. However, when he is 18 Henry will have the legal right to access to details of the donor's identity and it is open to him to trace the donor, who will be his genetic father but still not his legal parent. When Henry is in his teens, a possible story line could be questions that he asks about his identity and how Helen manages that. It could be predicted that Rob would struggle with this!

Other possible story lines that could have been explored include using a donor that is known to Helen, perhaps her dear gay friend Ian. They could have decided to go to a clinic and, provided all the forms were completed correctly, the conception would have fallen under the Human Fertilisation and Embryology Act 2008 which would have meant that Ian would still have had the status of a donor and not a legal parent as Helen wanted to be a single parent. Helen could have invited Ian to have some sort of relationship with Henry but his legal status would still have been that of donor and not legal parent.

Alternatively, they could have decided to artificially conceive outside of the clinic setting, in which case different law would apply. Ian would have had the status of a legal parent but unless he had been named on the birth certificate, he would not have had parental responsibility automatically. The crucial difference is that as a legal parent Ian would have been able to apply to the court as of right for parental responsibility, or even to spend time with Henry or for Henry to live with him when he could see what was going on with Rob. In contrast, if it had been a clinic conception, Ian would have had to apply to the Court for permission to make any application in respect of Henry.

Given that Rob did not consider Ian to be "man enough" to do very much at all, let alone provide the gametes to conceive a child, it would have been great to explore this as a story line at some stage. The only way that Rob could acquire the status of legal parent for Henry is to apply to adopt him as Helen's partner. That is clearly no longer open to him unless they reconcile.

*Rob's status: parental responsibility*

Although Henry spent most of his life with his maternal grandparents (Pat and Tony) before Rob came on to the scene, Rob has parental responsibility for Henry by virtue of persuading Helen to enter into a step-parent parental responsibility agreement that was formally completed in accordance with strict legal requirements including registration. The effect of the parental responsibility agreement is that it gives Rob the right to be involved (or at least consulted) in all major decisions relating to Henry, such as medical treatment, education, religion, and leaving the country but it does not give him the legal status of a parent. It does not make Rob Henry's legal father, he is merely Henry's step-father because he is

married to Helen. Pat and Tony don't have parental responsibility for Henry, even though they have cared for him in the past and indeed looked after him whilst Rob was in hospital.

It is very rare for parental responsibility, once granted, to be revoked but it is possible--only by further order of the court pursuant to section 4 of the Children Act 1989. Since the judge accepted the evidence of the local authority social worker that Rob had caused emotional and psychological harm to Henry, Helen may be successful if she were to make an application under this section. If Rob continues to share parental responsibility with Helen, he will not have the right to interfere with day-to-day decisions in Henry's life since Henry is no longer living with him. The exercise of parental responsibility by the non resident step-parent has to be realistic. If Rob seeks repeatedly and unreasonably to litigate every decision that Helen makes in relation to either of the children, the court has the power to bar him from bringing any further applications to court.

If Rob had adopted Henry, as at one point he wished to, he would have become Henry's legal father and would have had enduring parental responsibility. Helen would not have been able to ask the court to set aside the adoption order, and he would have been Henry's legal father for life.

## 2. Helen's status: acquitted

When the interim order was made in respect of Henry, Helen was remanded in custody awaiting her trial on very serious charges of attempted murder or malicious wounding of Rob. She was acquitted because the jury believed that she was acting in self defence. During the course of her evidence, she described the coercive control that Rob had exercised during their relationship including regular (or even routine?) sexual coercion. Rob's general propensity to coercively control his partners was corroborated by the evidence of Jess, his ex-wife.

However the criminal standard of proof--'beyond reasonable doubt'--is higher than that used in the family court. In family (and indeed all civil) cases, the standard of proof is 'on the balance of probabilities', ie that one has to be only 51% certain rather than 100% sure. This means that sometimes even though a criminal case has resulted in an acquittal the same (or similar) allegations can be considered independently in the family court by way of a 'Fact Finding Hearing.' If allegations are made out on the balance of probabilities, they become facts that must be considered by the judge before any welfare decisions can be made. However as these facts are found on a lower standard of proof, they are not criminal convictions.

Rob's counsel appeared to hint that a fact finding hearing might be necessary in this case. However Helen is in the extremely fortunate position that Judge Loomis, who heard the criminal trial, also hears family cases. He therefore indicated that it would be unwise to try to reopen these allegations by way of a fact finding hearing. The fact that Judge Loomis was hearing both matters within a week of each other was a very lucky break for Helen--almost as if it's been scripted!

In any case, Helen has admitted to stabbing Rob so this is already a fact of the case.

## 3. Domestic Abuse/Coercive control

Helen might instead have asked the court to make findings of fact in relation to Rob's behaviour towards her during their relationship. Domestic abuse (including coercive control) in a relationship is relevant insofar as it can be shown to affect the children who are the subject of proceedings. Domestic abuse between adults is emotionally damaging to children, particularly if it occurs in the presence of the children. It can cause them to be afraid and can affect their sense of security in their home. In the longer term children can learn to normalise this behaviour and are at risk of perpetuating these patterns themselves when they are in relationships of their own.

Helen is understandably concerned that Rob has used his malignant powers of coercion to control Henry, particularly in how he responds to his mother and Jack. However this alone is not necessarily a reason to deny Rob contact with Henry. Courts normally take the view that it is more important for a child to continue to have a relationship with a step-parent where the child has a psychological relationship with that parental figure, even a nasty one, than not to have any relationship at all. Although Henry is not Rob's biological son, he identifies Rob as his father and he is a psychological but not a legal parent to Henry. It would not necessarily be in Henry's best interest to lose this relationship, though Judge Loomis took a different view as will be discussed below.

However given the happy coincidence of Judge Loomis sitting in both the criminal and family cases, coupled with a statement from Jess prepared for the family proceedings, a fact finding hearing in relation to Rob's behaviour was not necessary. The learned judge already has the measure of Rob and no doubt bore this mind when coming to his decision about residence and contact.

#### *Rob and Helen's applications*

Rob made an application for Jack to live with him and Henry. Helen wished for Henry to move back to her care and for Jack to stay with her. In our opinion, there was never any doubt that the children would live together, as it is in their best interests to develop and enjoy a sibling relationship with each other. We were also certain that the children would live with Helen. Jack is still very young, indeed he is still nursing. Until the stabbing, Helen had been Henry's primary carer. Now that she has been acquitted it would be difficult for Rob to show that she is a danger to the children, particularly as she has successfully argued that he is an abuser himself.

We were confident that Helen would have care for both children and we expected that Rob would have contact with the children at specified times. Normally, a contact schedule is drawn up and will be adhered to unless the parties can agree otherwise. There would be provision for regular contact, staying contact (eventually), and holiday contact. However Judge Loomis has taken the decision that Henry should have no contact at all with Rob. While this might be a good outcome in some respects, it may be difficult for Henry to understand—particularly as Jack himself will be having limited, supervised contact with Rob while Henry is excluded. Judge Loomis might have considered at least maintaining some kind of a link between Rob and Henry by way of 'indirect' contact. This type of contact is not face to face and can include phone calls, skype, or even letters and cards. In the circumstances we would have expected that Rob would have been allowed to send the occasional card to Henry, although these cards would only be passed on by Helen if she felt the contents were appropriate.

In light of Judge Loomis's view of the unacceptable risk of harm (psychological, emotional and physical) to Henry, he has held that it is not in his best interests to have any contact (even indirectly) with Rob. It appears that he has not expressly forbidden contact, but he has not made any order allowing it. To guard against any future applications to the court from Rob, Helen would be advised to get a copy of Judge Loomis's judgment. She is not likely to have the same judge yet again.

Regardless of the outcome, the order will record the court's expectation that Helen and Rob are not to denigrate the other party in front of the children and they should not permit others to do so--Ursula should take note!

In case anyone wonders why a local authority social worker was giving evidence: in proceedings between families the court can ask either a family court reporter or a social worker to carry out investigations and provide a report. A court can also ask a local authority to carry out investigations with a view to deciding whether or not an application for a care order should be made. Given that (to an outsider who had not been privy, as we all were, to Rob's abusive campaign) this was a very serious, apparently unprovoked, attack by one parent against the other which was witnessed by the child, this is likely to have been the latter kind of report. We do not know what the report said, except that the social worker (rightly in our view) believed that Henry had been emotionally and psychologically abused by Rob and it is likely that it recommended that Henry return to the care of Helen.

#### 4. Jack's name

Helen registered Jack as "Jack Anthony Archer" Rob wishes him to be called "Gideon Robert Titchener". From a legal perspective an individual can call themselves whatever they want. However, if you wish to have legal proof of a name it is necessary to evidence this by a birth certificate, or by a deed poll. It is easier for a parent to change a child's forename than their surname. Theoretically, there is nothing to stop Rob continuing to call the baby "Gideon" and Helen calling the baby "Jack". However, a court would find it emotionally harmful to a child to be called different names, and Helen could, if Rob persists in doing this, apply to the court for an order to stop Rob exercising his parental responsibility in this way (assuming he keeps his parental responsibility).

Rob could make an application to the court for permission to change Jack's name formally to "Gideon Robert Titchener". The paramount consideration would be Jack's welfare. The court would consider other relevant factors including the fact that his name on his birth certificate is already "Jack Archer", the circumstances surrounding his conception and the other abuse Rob subjected Helen to, and that his half-brother is called "Archer." Whether or not the parents are married is relevant – but we anticipate that Helen will be divorcing Rob. It is not often you can say decisively what you think a court would do, but we are all agreed that a court would not give Rob permission to change Jack's name.

No doubt Rob's insistence on using the name 'Gideon' for Jack raised alarm bells for the social worker and the court. It turns out that there is a lot in a name.

#### 5. What the future might hold...

Of course, although the proceedings in respect of Henry appear to have concluded with no order being made for contact, Jack will have limited contact whilst a psychological assessment is undertaken of Rob. The purpose of this assessment is to evaluate the risk Rob may pose to Jack and to evaluate Rob's psychological functioning more generally. The assessment would certainly be an interesting read! But it is unclear whether Rob will cooperate with the assessment as he does not appear to accept that it is necessary.

The proceedings have therefore not concluded in relation to Jack. There will be at least one more hearing. If Rob has not cooperated with the assessment then the temporary arrangement is likely to become permanent. This may cause difficulties for Pat and Tony as they would continue to have to supervise Rob's contact with Jack.

We would therefore respectfully disagree with our learned friend Ms Treggoran who said to Helen that this hearing 'was the final hurdle' and that Helen is now 'properly free.' More is surely yet to come.