



Neutral Citation Number: [2020] EWCA Civ 1031

Case No: B4/2020/0962

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM NOTTINGHAM FAMILY COURT
HHJ Lea
NG19C00235

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 August 2020

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE BAKER
and
LADY JUSTICE CARR

Re D-S (Contact with Children in Care: Covid-19)

Helen Knott (instructed by **Nottingham Family Law**) for the **Appellant Mother**
Stephen Abberley (instructed by **Nottingham City Council**) for the **Respondent Local Authority**
Maria Mulrennan (instructed by **Jackson Quinn Solicitors**) for the **Respondent Children by their Children's Guardian**

Hearing date: 28 July 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Tuesday, 4 August 2020.

Lord Justice Peter Jackson:

Introduction

1. This appeal arises from a mother's application for contact to her three children, who are in interim local authority care. The children are aged 7, 3 and 1½. They were taken into care in September 2019 after the youngest child was found to have a leg fracture that is considered likely to have been inflicted. The mother, with whom the children were living, is one of the adults who may have caused the injury. The question of who was in fact responsible cannot now be decided until a hearing in November 2020. In the meantime, the children have been living with their maternal grandmother under interim care orders.
2. As to contact:
 - (1) Until the lockdown in March 2020, the children had contact meetings with their mother three times a week for two hours. These meetings were supervised by a local authority employee rather than the grandmother herself, because she had expressed doubt about whether the mother was capable of causing the injury. Thereafter, the local authority's two contact centres closed. The children then only had indirect contact by telephone and video call, arranged between the grandmother and the mother without supervision. For the children, particularly the younger two, this was of course not a very satisfactory form of contact.
 - (2) At a case management hearing on 28 May, the mother indicated that as matters had progressed to the point that the eldest child was returning to school, she was asking the local authority to make proposals for the re-establishment of face to face contact. The court ordered the local authority to serve a position statement explaining the consideration it had given to the matter and setting out any plan that it had.
 - (3) On 3 June, the local authority stated in a position statement that it did not propose to reinstate face to face contact. It referred to the Government guidance prevailing at the time that allowed small groups from different households to meet in open spaces with social distancing: the children were too young to be expected to observe social distancing.
 - (4) The mother pressed the point, and at a further hearing on 5 June, the local authority was ordered to file a statement from the social worker:

“addressing the local authority's position regarding contact between the mother and the children, addressing specifically the risk assessment undertaken given the current health circumstances, the options available to facilitate direct contact and timescales for arranging this, an analysis of the balance of harm in the proposals for contact and addressing the issues in respect of the individual children.”
 - (5) On 12 June, the social worker filed a statement in which she said that she had considered whether it would be possible to facilitate direct contact in a safe and manageable way while keeping to Government guidance. She did not propose

any direct contact because the children could not be expected to socially distance themselves from their mother. Seeing her without being able to act naturally would be harmful for them and place the mother in an impossible situation. Contact would be kept under review.

- (6) On 13 June, Government guidance changed to allow “social bubbles” in which two households could meet with each other exclusively, as if they were one household and without social distancing.
 - (7) On 19 June, the mother applied for a contact order. In her application, she challenged the requirement for social distancing, saying that she and her mother were willing to form a “bubble”. That proposal was restated in the position statement prepared by the mother’s solicitor for the hearing. It was also suggested that while contact centres were closed, meetings could take place in a local park, professionally supervised, but with the support of the grandmother.
 - (8) The Children’s Guardian was broadly sympathetic to the mother’s request for a resumption of direct contact.
3. The hearing took place by telephone before His Honour Judge Lea on 22 June. Having heard submissions, he dismissed the mother’s application for reasons that he gave in a written judgement handed down on the following day. The mother subsequently applied for permission to appeal, which I granted on 16 July.
 4. On 17 July, the local authority informed the mother that face to face contact would be resumed and would take place under supervision at a contact centre once a week for 90 minutes. That has been the case since 22 July. Indirect contact by telephone/video has continued twice a week without external supervision.

The Judge’s Decision

5. Having summarised the history and the positions of the parties, the Judge succinctly expressed his reasoning:
 - “13. S 34(1) states “where a child is in the care of a local authority, the authority shall allow the child reasonable contact with parents”. This statutory provision encapsulates what is usually referred to as the obligation of a local authority to promote contact between a child in care and its parents.
 14. By s.34(3) on an application made by [a parent] the Court may make such order as it considers appropriate with respect to the contact which is to be allowed between the child and any named person.
 15. The interplay between these 2 subsections means that in practice that the court does not dictate to the local authority what contact should take place between a child in care and its parents providing the contact that is allowed is “reasonable”.
 16. In these unprecedented times it is difficult to set out precisely what level of contact is “reasonable”. Regard must be paid to

Government guidance around issues such as social distancing and the use of PPE. Such guidance is not always consistent from one day to the next. A local authority is entitled to have regard to its own resources in terms of the number of staff available to it to facilitate face to face contact with staff numbers inevitably reduced because of individual decisions taken to self-isolate and the need to deploy social workers to areas of highest priority when issues of safeguarding arise. To create exceptions to the current situation where all contact between parents and children in the care of NCC is restricted to indirect contact produces an equality of unfairness in that there is nothing particularly exceptional about the position of the mother here.

17. I have enormous sympathy for parents whose contact to their children in care is currently restricted to indirect telephone contact as is the position here. The impact of restrictions imposed by reason of the Covid 19 pandemic has been severe. Those ill or dying in hospital have been denied visits from friends and family. Children have been denied education. Many grandparents have not been able to hug their grandchildren. Funerals have been restricted so that many mourners have been unable to attend. The issue I have to determine is whether the arrangements currently being made for the mother to have contact with her children are reasonable in the current circumstances. If they are there is no basis upon which I should make an order under s.34(3) to compel the local authority to make arrangements for face to face contact.

An order for indirect contact can depending on the circumstances be an order for reasonable contact which meets the statutory obligation of the local authority to allow reasonable contact. Here I am satisfied that the contact provided is reasonable and in those circumstances must dismiss the mother's application."

The arguments on appeal

6. For the mother, Ms Helen Knott acknowledged that with the resumption of direct contact the appeal had become academic as far as her client was concerned at this moment. However, she invited us to hear the appeal as she argued that the judge's approach was wrong and the issue of the local authority's approach to contact may resurface if circumstances change. The thrust of her argument was that the judge approached s.34 Children Act 1989 ('CA 1989') incorrectly and that he fettered himself by deferring to the local authority. As a result, he did not make the individualised welfare decision that was required. He did not give consideration to the mother's proposals or address the inadequacy of the local authority's response.
7. On behalf of the local authority, Mr Stephen Abberley accepted that an individualised assessment of what contact was appropriate was required and he conceded that the social work statement did not deal with the matters that had been ordered. He nevertheless sought to uphold the judge's reasoning and conclusion. Even though the judge did not make an explicit welfare assessment, he will inevitably have viewed the

issue before him through the prism of the children's welfare. He was asked to consider whether the local authority's position was reasonable and he was entitled to consider that the local authority was best placed to make a decision about contact. The court could not be required to enquire into management decisions. As to the statute, there is no real difference between the concepts of "reasonable" and "appropriate" contact. The judge was right to say that in practice, the issue is whether the arrangements are reasonable and that, if they are, there is no basis for the court to intervene. Even if the court's conclusion was somewhat different to that of the local authority, it might apply the 'no order' principle and decline to make a contact order. Mr Abberley accepted that his submission amounted to the court affording the local authority a margin of appreciation or, colloquially, giving it the benefit of the doubt.

8. For the Children's Guardian, Miss Mulrennan supported the consensus that the local authority's evidence had not properly addressed the issues. With hindsight, the decision should have been postponed for that information to be gathered. She expressed some sympathy for the legal analysis of s.34 advanced by Mr Abberley.

Conclusions

9. At the end of the hearing, we informed the parties that the appeal would be allowed and the judge's order dismissing the mother's application would be set aside and replaced by an order that there be no order on the application. That outcome is possible because there is happily now agreement about contact. We have nonetheless heard the appeal as the issue is of wider importance. These are my reasons for concurring in our decision.
10. As the judge eloquently wrote, the present emergency has caused sad losses for many people and real challenges for the professional services. For many children in care and for their families, the loss of contact will have been particularly difficult. Where it is unavoidable, it is an occasion for sympathy, but where it can to some extent be remedied, that should be attempted where possible. This is underscored by the prevailing guidance from the Department of Education, entitled *Coronavirus (Covid-19): Guidance For Children's Social Care Services*:

"What about court orders related to contact for children in care?"

We expect that contact between children in care and their birth relatives will continue. It is essential for children and families to remain in touch at this difficult time, and for many children, the consequences of not seeing relatives would be traumatising.

Contact arrangements should, therefore, be assessed on a case by case basis taking into account a range of factors, including the government's current social distancing guidance and the needs of the child. However, we expect the spirit of any court-ordered contact in relation to children in care to be maintained.

Where it may not be possible, or appropriate, for the usual face-to-face contact to happen at this time, keeping in touch will, for the most part, need to take place virtually. In these

circumstances, we would encourage social workers and other professionals to reassure children that this position is temporary. We would also expect foster parents and other carers to be consulted on how best to meet the needs of the children in their care and to be supported to facilitate that contact, particularly if those carers are shielding or medically vulnerable.

We recognise that some young children may not be able to benefit from virtual contact with their family, because of their age or other communication challenges. In these circumstances, local authorities should work with families to identify ways to have safe face-to-face interactions, whilst still adhering to social distancing guidance.

When considering the most appropriate ways for children to stay in touch with their families, social workers and carers should seek the views of children who may welcome different forms of contact, including less formal and more flexible virtual contact with their birth families.”

The key point is that contact arrangements should be assessed on a case by case basis.

11. The statutory framework surrounding parental contact with a child in care is straightforward:
 - (1) The local authority is under a duty to allow the child reasonable contact with his parents: CA 1989 s.34 (1). It must also endeavour to promote contact between the child and his parents unless it is not reasonably practicable or consistent with his welfare: CA 1989 Sch 2 para. 15 (1).
 - (2) Where an application is made to the court, it may make such an order for contact as it considers appropriate: s.34 (3). When doing so, the child’s welfare is its paramount consideration. It must have regard to the welfare checklist and it must not make any order unless it would be better for the child than making no order at all: CA 1989 s.1 (1), (3) and (5).
12. In the first case, the decision about contact is one for the local authority. In the second case, it is one for the court. The fact that there will be mutual respect between the authority and the court cannot mask this distinction. A parent applying for contact is entitled to expect that the court will form its own view of what contact is appropriate in all the circumstances, however influential the professional view of the local authority may turn out to be.
13. Once the court has formed its own view, it has a broad discretion as to whether or not to make a contact order. It may well decide, applying the ‘no order’ principle, not to make an order because its conclusion about what contact is appropriate is broadly equivalent to be contact that is being offered, or, for example, because the making of an order may lead to a loss of flexibility, or because practical considerations make an ideal level of contact unachievable. But the essential point is that the court must reach its own conclusion and ensure that it has the information it needs to do that. It does not

defer to the local authority, and the local authority is no more entitled than any other party to the benefit of any doubt.

14. I therefore would not accept Mr Abberley's argument in support of the judge's analysis. The question for the court was not whether the local authority's position was reasonable, but what contact was appropriate, giving paramount consideration to the children's best interests and taking account of all the circumstances, including the reality of the pressures on services at the present time.
15. In this case, as in others like it, there is no doubt that face to face contact would be in the children's interests if it could be achieved. In order to form a view about that, the court needed basic information about the children's situation, the local authority's resources and the current Government guidance. Unfortunately, the decision in this case did not grapple with these matters except at a general level. The judge was of course right to say that regard must be had to fluctuating Government guidance, including as to social distancing, but at the time he came to make his decision, social distancing was not an absolute obstacle to contact. He was also obviously bound to acknowledge the finite resources of the authority and its need to prioritise, but he had been given no evidence about that either. Clearly, the practical challenges might mean that less contact was appropriate than before – as the outcome of this case shows – but the evidence before the court did not support the conclusion that no face to face contact at all was possible. Accordingly, if the judge did not feel able to approve the proposal made by the mother, he should have adjourned for a short time for the local authority to provide better evidence. What he was not in my view right to do was to dismiss her application for the reasons he gave.
16. The result of the appeal confirms that the ordinary principles governing applications for contact with children in care continue to apply during the Covid-19 pandemic, even though outcomes may well be affected by the practical difficulties that are being faced.

Lady Justice Carr

17. I agree.

Lord Justice Baker

18. I also agree.
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