Neutral Citation Number: [2018] EWCA Civ 305
Case No: B4/2017/2045

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HHJ PEMBERTON

Royal Courts of Justice
Strand, London, WC2A 2LL

28/02/2018

B e f o r e :

LADY JUSTICE KING
LORD JUSTICE MOYLAN
and
LORD JUSTICE PETER JACKSON

Re G (A Child)

Ms Marisa Allman (instructed by Best Solicitors) appeared on behalf of the Applicant
Ms Louise Stanbury (instructed by Bell & Buxton) appeared on behalf of the 1st Respondent
Ms Deirdre Fottrell QC and Mr Luke Eaton (instructed by Ison Harrison Solicitors) appeared on behalf of the 2nd Respondent

Hearing date: 20 February 2018

HTML VERSION OF JUDGMENT APPROVED

Lord Justice Peter Jackson :

Introduction

1. The individuals involved in this case are not to be identified and their real names are not used in this judgment.

2. This appeal, brought with the permission of McFarlane LJ, relates to a narrow issue, but one that is of real significance to the parties. It arises from one paragraph of a child arrangements order made in June 2017 by Her Honour Judge Pemberton, sitting as a Deputy High Court Judge. The main part of the order provided for the applicant (Brian) to spend time with a four-year old child (Aidan) seven times a year for two hours at a time in the presence of the child's parents (Jane and Carol) and other adults and children of their choosing. The paragraph that is the subject of the parents' appeal reads as follows:

   "The arrangements for the child to spend time with the Applicant may include the applicant's parents on two occasions per year if the Applicant so wishes."

3. No criticism is made by Jane and Carol of Brian's parents. Rather, as they explained to the judge, they consider the obligation imposed by the court to be an unwarranted interference with their freedom to parent Aidan as they think best.

Background

4. Jane and Carol met in 2007. Carol has an older daughter from a previous relationship. She and Jane became civil partners in 2010.

5. Jane and Carol wanted to have children themselves, and now have two sons, Harry and Aidan, both born to Jane by artificial insemination. Harry was born in 2010 after an arrangement with a donor who was a friend of a friend and who agreed not to play any role in the child's life.

6. In Aidan's case, the donor was Brian. He was a work colleague of Carol's and became a friend of both women. It is common ground that Jane and Carol alone would be the resulting child's parents. However, the judge found that the basis on which Brian was donating his sperm

and the involvement he would have in the child's life was never explicitly agreed. His account was that the child was to know that he was the father and that he would see the child regularly. Jane and Carol's understanding was that Brian would see the child on the same basis as he saw the children of other friends.

7. Aidan was born at the end of 2012, and by operation of law Jane and Carol are his only legal parents. For the next three years, Brian saw Aidan weekly or fortnightly by agreement. He did not take on a parental role, but the judge found that he was a familiar figure in Aidan's life. His parents met Jane and Carol, both before and after the birth, attending family events together some eight or nine times over the course of three years.

8. In the summer of 2013, Jane and Carol separated, with Carol forming a relationship with a man who has children of his own, and the following year Jane formed a new relationship with another woman. However, they have continued to co-parent Aidan and have been united in this litigation, in which they are now joint Appellants.

9. As time went on, and particularly after the parents separated, they began to find Brian's requests to spend time with Aidan burdensome and troubling, and at the end of 2015 they started to impose boundaries. Relationships then became strained and there was then a period of some 18 months when there was no contact between Brian (or his parents) and Aidan. Contact with Brian restarted in May 2017, but that did not include his parents.

10. Meantime, in April 2016, Brian issued an application for permission to apply for a child arrangements order allowing him to see Aidan. Permission was granted, but the proceedings were unfortunately protracted and it was not until June 2017 that the judge made her orders after hearings lasting four days in all. By that stage, Aidan was represented by a Children's Guardian.

11. The position of the parties about how much time Aidan should spend with Brian evolved during the course of the proceedings. At the outset, Brian was asking for independent contact, with a visit once a week, staying contact every third weekend, and a week's holiday in the summer. Although his parents were not specifically mentioned, it would have been natural for them to be involved to some extent in that kind of contact. For their part, the parents offered no contact for Brian at all. However, both sides responded to advice from the Guardian, and by the time of the hearing Brian sought meetings once a month, while the parents suggested once a quarter, though with

some reservations, particularly on Carol's part. In the end, the Guardian proposed seven meetings a year under closely controlled conditions. She was clear that this was not to treat Brian as a parent, but to give Aidan "the opportunity to have some meaningful level of contact with his donor that assists him in understanding his identity in a very low key way." The main issue for the judge was therefore to determine the frequency of this contact.

12. As to meetings between Aidan and Brian's parents, there was no common ground. The Guardian proposed that they should be allowed to attend their son's contact twice a year. Brian was in agreement, but the parents strongly opposed them attending.

The judge's decision.

13. The judge heard evidence from Brian, his father, the parents and the Cafcass officer. It is apparent from the transcripts that it was not an easy hearing, in particular because of the intensity of the parents' feelings and the evident distress that the litigation was causing them.

14. The judge gave a reserved judgment. It is in almost every way an admirable document that sets out her findings and her reasoning on the basis of a secure understanding of the legal framework. In relation to the foreground issue of the frequency of Brian's contact, the judge followed the analysis of the Guardian and concluded that it should take place seven times a year. She reasoned this conclusion with careful reference to significant factors in the welfare checklist, including reference to the capabilities of the parents, of Brian and of his parents. She noted the strength of feeling of the parents, and the fact that Brian is not a legal parent, but she accepted the Guardian's analysis that there is a lifelong link that Aidan is likely to become more curious about as his sense of identity increases, and that he needed enough contact to have a meaningful understanding of Brian's place in his life. There has been no appeal from this decision, and there have been a number of meetings between Aidan and Brian since the order was made.

15. Turning to the question of the involvement of Brian's parents, the issue was quite extensively explored during the evidence. In particular, it was addressed by the Guardian. Paraphrasing, she said: they should not have separate contact; they should not see Aidan as his grandparents but as the parents of his donor; although there was no application on their part, meetings with people who wished him well were likely to be positive for Aidan; that it was not likely to be confusing to him, and that this concern had not prevented earlier

meetings taking place; that they could be relied upon not to overstep the mark; and that above all it will be helpful for Aidan to have this fuller understanding of his background – "It's about him understanding the big picture of his birth story".

16. The judge's treatment of this issue in her judgment is exceptionally brief. She deals with it in a single paragraph:

"I do accept the Guardian's analysis in terms of [Brian]'s parents joining in some of these contacts simply to give Aidan a greater sense of and understanding of his paternal lineage. I think that for this purpose, [Brian]'s parents should be able to join in the contacts on two occasions per year and should be able to send birthday and Christmas cards to [Aidan]. They should be referred to in all contacts [by their forenames]."

17. I also refer to the judge's reasons for refusing permission to appeal. She noted that the issue had been a live one throughout the proceedings and referred to the amount of evidence and argument she had heard about it. She said she had adopted the Guardian's analysis that it was in the child's interests for him to spend time with Brian's parents in circumstances where they have a biological connection to the child and had been involved in his life, both before and after his birth, with the agreement of both parents. Responding to the argument that her order conflicted with the views of the parents, she noted that this was something that regularly happened in contested proceedings.

18. Before coming to the grounds of appeal, I would make one comment. The judge's order left it up to Brian to decide the occasions on which his own parents would attend, without any requirement to notify Aidan's parents in advance. Common courtesy, I think, makes it implicit that Brian is expected to give advance notice of his intentions to the parents. That would be in the spirit of the other terms surrounding the meetings, which are designed to make the occasions easier for the adults and enjoyable for Aidan.

The grounds of appeal

19. On behalf of the parents, Ms Marisa Allman advances two grounds of appeal. The first is that the judge made a legal error in imposing an order in favour of Brian's parents where (i) they have no legal or psychological relationship with Aidan, and (ii) they were not parties to the proceedings, were not entitled to apply for an order and had not sought or been granted leave to do so.

20. In relation to this argument, the relevant provisions are contained in Section 10 of the Children Act 1989. Section 10(1) empowers the court to make a Section 8 order where

(a)(i) the applicant is among the persons defined in s.10(5) as being entitled to apply, or

(a)(ii) the court has granted leave for the application to be made by someone not entitled to apply, or

(b) when the court, having considered the matters that out in s.10(9), considers that the order should be made even though there is no such application.

In developing her first argument, Ms Allman came close to arguing that in any case where the court was considering making an order under (b) in favour of a third party, it should go through the mental process required by section 10(9) before it asked and answered the welfare question. Otherwise, she said, the framework of the Act would be bypassed.

21. In my view, this submission is misconceived for two reasons. Firstly, it is wrong in principle to limit the court's power to make an order under section 10(1)(b) in an appropriate case. As Butler-Sloss LJ said in in Gloucestershire County Council v P [1999] 2 FLR 61 at 72-73:

"The power given to the court by s.10(1)(b) incorporates into the Children Act the jurisdiction of the High Court in wardship to make the most appropriate order in the interests of the child without being trammelled by procedural hurdles… I do not consider that, in the absence of clear words of restriction upon the powers of the court which are to be found in other parts of the Act, s.10 should be read narrowly so as to curtail the powers of the court in the exercise of its discretion, where the welfare of the child is paramount… I think is important, however, to add some words of caution. It is obvious, and indeed has been underlined in this court, that the court's power to make an order not asked for by any party ought to be used sparingly and with caution and only after giving all parties proper time to make submissions."

That case concerned the question of whether the court was entitled to make an order in favour of a foster parent who was otherwise disqualified from being an applicant. The present case is different, and there is of course no question of the order having been made without the parties having had the opportunity to make submissions.

However, the principle that the power under section 10(1)(b) should not be read narrowly is in my view of general application.

22. The second reason for rejecting the submission is that it would introduce a needless layer of complexity for the court to be required to carry out a preliminary mental exercise when it is considering whether to make an order where no application has been made. Any court considering making an order on its own initiative will procedurally ensure that the parties have had an opportunity to be heard on the matter and will substantively need to decide whether such an order is in the child's interests. When considering the question of welfare, it will inevitably bring the child's background into its calculation, leading it to consider the connection that the third party has with the child and the reasons why an order might or might not be appropriate, taking all the circumstances into account. As part of that welfare evaluation matters of the kind raised by Ms Allman in this case will be considered on their merits, rather than by means of some ill-defined form of preliminary filter.

23. That leads to the second ground of appeal, which to my mind addresses the real issue in this case. Ms Allman argues that the judge failed to carry out any sufficient analysis of Aidan's best interests before making her order. She says that the judge did no more than identify that there would be benefit to Aidan from seeing Brian's parents. She did not go on to consider and balance up the competing factors, such as the slender relationship they had with Aidan, the length of time since he had seen them, the possibility of confusion in introducing yet another set of grandparental figures, the parents' strong opposition to an unnecessary extension of identity contact, and the fact that Brian's parents had not (and quite possibly would not have) obtained permission to make an application themselves. It was not good enough, says Ms Allman, for the judge simply to adopt the analysis of the Guardian, and it is not possible to know what she made of the contrary arguments that were put before her.

24. In response, Ms Stanbury for Brian and Ms Fottrell QC and Mr Eaton for Aidan argue that the issues of Brian's contact and contact for his parents were in reality wrapped up in each other, that they were two logical elements of the same decision, that the judge was entitled to accept the Guardian's advice, and that it was unnecessary for her to carry out a separate welfare analysis.

25. I have some sympathy with the parents' complaint in this respect. In a case of this sensitivity, the continuing involvement of Brian's parents was an issue that deserved its own separate analysis, not least because

the parents opposed their involvement (but not Brian's), but also because Brian's parents could not be said to be essential for the purposes of identity contact and because of the issue of possible confusion. The judge should, as Ms Fottrell conceded, have gone further than to adopt the Guardian's reasoning. She should have set out her own reasoning for her decision and dealt with the opposing arguments, something that she could no doubt have done quite briefly.

26. However, the order that the judge made was one that she was plainly entitled to make on the evidence before her. It cannot be said to have been wrong in itself and the question therefore arises as to whether the scarcity of reasoning amounts to a serious procedural error. As to that, my conclusion is that it does not. When one reads the evidence and the judgment as a whole, it is clear that the judge had a grasp of all the relevant issues and that she was accepting clear evidence in relation to each of the factors bearing upon the involvement of Brian's parents. The single paragraph dealing with their position, inadequate though it is in isolation, follows a comprehensive analysis of Aidan's overall welfare, taking full account of the views of his parents. Looking at the judgment as a whole, it contains enough information to enable them to understand why the order was made. I am therefore not persuaded that there has been a serious procedural error entitling this court to interfere.

27. I would accordingly dismiss this appeal, while expressing the hope that as time passes the emotions surrounding these proceedings will subside. Whatever the state of the relationship between the adults, they once cooperated to create Aidan, a much-loved child. They now owe it to him to try to recapture something of that spirit. The outcome of the case has been that the parents have been firmly acknowledged to be his only parents and the role of Brian and his parents has been defined in a very specific and limited way. To the extent that the court overruled the parents on some fairly narrow issues, they can be reassured that this is an experience they share with many parents when a court has been asked to resolve difficult, disputed issues relating to the welfare of a child. Here, both sides unselfishly made compromises in the course of the proceedings, and they must now make the order work for Aidan's benefit.

Lord Justice Moylan:

28. I agree.

Lady Justice King

29.I also agree.