Neutral Citation no. [2002] NIFam 18

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Ref: GILF3734
Delivered: 28/06/2002

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

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RE: S (DIRECTION HEARINGS. CONTACT ORDER)

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GILLEN J

This is an appeal against the order of His Honour Judge Markey sitting at the Family Care Centre, Laganside Courts, Oxford Street, Belfast in which he made an order that contact in respect of a child S (born on 23 July 2000) with his father and mother should be reduced from three times per week to once per week.

I make a direction that there should be no identification of the name of the child, the name of either parent, any address or anything else that may lead to the identification of this family.

The background of this case can be stated in fairly short compass. A Health and Community Service Trust, which I do not propose to name ("the Trust") seeks a care order in relation to the child. The child was subject to an emergency protection order on 16 July 2001 on foot of the Trust case that the behaviour of the parents was too unpredictable for the child to be returned safely to their care without a full assessment being made of their parenting

capacity. A series of interim care orders had been made. At a hearing on 14 January 2002 the threshold criteria were established between the parties and an agreement ratified by the court. The overall aim of the care plan is that following the successful completion of a number of assessments the child may return to the care of the mother. The Trust propose that the mother and father should see Mr Paul Quinn, consultant clinical psychologist for assessment with regards to their potential for change and their ability to safely parent the child. A trial date has been fixed for September 2002 and in the meantime Mr Paul Quinn is to make a report available. The child is currently living with her paternal aunt and her husband pursuant to a series of interim care orders.

I was informed that on 17 June 2002 a review hearing and renewal of the interim care order had been fixed for the Family Care Centre. The court was to consider the report of Mr Quinn together with a further amended care plan and on foot of same, to give appropriate directions. An application for a further interim care order was also scheduled for that date. I was further informed that the amended care plan became available on 14 June, together with a report of Mr Quinn dated 13 June. A schedule of contact visits was made available to the appellant mother and the appellant father on the morning of 17 June. This schedule of contact visits may have been of particular importance in that it indicated poor attendance which would have merited an explanation from the mother and father. It may also have been relevant to the suggestion of Trust counsel that S was unsettled and clingy after visits. The amended care plan envisages the child remaining in long

term foster care and contact with each parent, which at that stage was three times per week, was to be reduced to once per week. The guardian ad litem had been ill and was not present on 17 June although she was represented by a solicitor who informed the court that the guardian had not been in a position to make enquiries to enable her to form a view as to the proposed contact arrangements suggested by the Trust. The mother was present in court and represented by counsel who submitted to the court that there had not been an opportunity to take appropriate instructions as to the proposed reduction in contact and therefore she asked for a date to be fixed for an oral hearing. Unfortunately there is not before me a written judgment in compliance with Rule 4.21(4) of the Family Proceedings Rules (Northern Ireland) 1996 and therefore I must rely upon what I have been told by the parties as to what has been said. The failure to provide such a judgment may prevent an appellate court being able to decide whether or not the court below has failed to take into account relevant matters or has inappropriately taken into account irrelevant matters. That omission may well be a ground alone for allowing an appeal as in the case of B –v- B (1997) 2 FLR page 606.

It has been agreed by all parties before me in this instance that the applicant Trust did not formally apply for the contact to be reduced from three times per week to once per week in the case of either the father or the mother. The court, as it is entitled to do so, did however proceed to deal with the matter of reduction of contact of its own volition. The appellants in this matter were apparently given no notice that this issue was to be raised or

determined and certainly it seems common case that no application had been made by the Trust pursuant to Article 53(2) of the Children (Northern Ireland) Order 1995. The appellants sought a full hearing date from the judge to deal with the matter of contact. The appellants wished to give evidence. It is clear that the judge indicated that there was no court time available to have a hearing and decided the matter at this directions hearing on the basis of submissions from counsel. Accordingly there was no statement from either parent dealing with the issue, and neither of them give evidence. The father was not present at the hearing although I am told by counsel that had he realised it was anything other than a directions hearing and indeed a full hearing of the contact issue, he would not only have appeared but would have wished to have given evidence.

On these facts, I have come to the conclusion that this order must be set aside and the matter remitted to the Family Care Centre for a full and appropriate hearing. I have come to this conclusion for the following reasons:

(1) This case was listed for the twin purpose of renewing an interim care order and for directions to be given. A directions hearing, which is held pursuant to 4.15 of the Family Proceedings Rules (Northern Ireland) 1996 is intended to be purely for directions. The issue of a contact order made in the context of a directions hearing was recently raised in Re D (2001) AER (D) 211 (November). In that case during the course of a directions hearing, the judge felt obliged to make an order defining contact and moved the situation allowing visiting contact in respect of a three year old child to staying contact

overnight. The Court of Appeal reversed the order. In the course of her judgment Dame Elizabeth Butler-Sloss said at paragraph 18:

> "It is possible, on a hearing for directions, for the court to make a definitive order if the evidence is all one way and is absolutely clear. That is a way of dealing with the case that may be appropriate in unusual circumstances. But normal procedure in family cases is that a directions hearing is attended to be for directions only. For instance, in a case where a parent has unilaterally stopped contact which has gone on before in circumstances where there is no evidence to show it should not go on, it is entirely appropriate on a short hearing to reinstate the contact. The court does not need the parties to give evidence unless it is concerned that pre-existing contact for one reason or another should not be continued."

At paragraph 20 the judge went on to say:

> "Despite what the Recorder said, he plainly jumped the gun. He plainly did go ahead of what is an appropriate way of dealing with a case at a directions hearing. The mother does object. She is entitled to have concerns placed before the court so that the judge has the advantage of the evidence of both parties and the opportunity to see that the child will be properly looked after in every sense. … She is entitled to tell the judge how she feels about staying in contact. That opportunity she was not given."

I consider in this case, the appellants may well have been totally unprepared for a contact hearing. The father was not even present, although he was represented by counsel. The mother wished to give evidence but was not afforded the opportunity to do so. Counsel had specifically said that there had been insufficient time afforded to allow proper instructions to be taken. I appreciate that the Family Care Centres have a busy schedule, but I consider that time has to be made for a matter as important as reduction of

contact where the parties are unprepared to deal with a fairly sudden application by the Trust particularly when it has been made in the absence of a formal application.

(2) In very helpful skeleton arguments prepared by the counsel for the guardian ad litem and counsel for the appellants, augmented by submissions before me my attention to various articles of the Children Order (Northern Ireland) 1995. They were as follows:

(a) Article 53(5) provides:

> "When making a care order with respect to a child, or in any family proceedings in connection with a child who is in the care of an authority, the court may make an order under this article, even though no application for an order has been made with respect to the child if the court considers that the order should be made."

Consequently the court clearly did have power to make an order under Article 53(2) defining the contact. However Article 53(11) provides:

> "Before making a care order with respect to any child the court shall –
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> (a) consider the arrangements which the authority has made, or proposes to make, for affording any person contact with a child to whom this article applies; and
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> (b) invite the parties to the proceedings to comment on those arrangement."

Although this was an interim care order application, Article 49(1) ensures that a care order includes an interim care order. Accordingly the court was obliged to invite the parties to comment on the proposal to define contact particularly where it is being changed. Since these are specified

proceedings within Article 60(6)(a) and (f) both the parents and the child require to be afforded an opportunity to comment on the proposed contact arrangements. By Article 60(2) of the 1995 Order, the guardian ad litem is under a duty to "safeguard the interests of the child in the manner prescribed" by the Family Proceedings Rules. By Rule 4.12(2)(b) the guardian shall "instruct the solicitor representing the child on all matters relevant to the interests of the child, including possibilities for appeal, arising in the course of the proceedings". By Rule 4.12(5)(e) and (f) the guardian ad litem is under a duty to advise the court of the "options available to it in respect of the child and the suitability of each such option including what orders should be made in determining the application" and "any other matter concerning which the court seeks its advice or which considers the court should be informed". Accordingly it seems clear that the court was obliged to invite the comments of the guardian ad litem as representing the child either personally or through the child's solicitor.

I have come to the conclusion that to enable the court to perform its duty of inviting comments before making an order, that invitation predicates the parties having been given a reasonable opportunity to instruct counsel and to consider and make their comments on an informed basis.

(3) Counsel drew my attention to the fact that the judge in the Family Proceedings has a wide discretion as to whether or not it is necessary to hear oral evidence and allow cross-examination and can conduct a case as is most appropriate to deal with the matters and issues (see Re B (minors) (contact)

(1994) 2 FLR at p. 5F). In this case the judge indicated that in his opinion an oral hearing was unnecessary. He concluded that all the points relevant to the mother's case where canvassed and were clear from the papers. The mother's oral evidence and cross-examination of the Trust witnesses, would in his judgment have made no difference to the possible conclusion.

The leading authority on the discretion vested in the court to determine issues without hearing oral evidence is Re B (1994) 2 FLR p. 1 at p. 5 where Butler-Sloss LJ (as she then was) said:

> I agreed with counsel that there is sufficient information before this court upon which we can form a view whether these applications should be heard by a judge on oral evidence or whether in the exercise of the discretion of this court, they can properly be determined upon the written evidence and submissions of counsel. The considerations which should weigh with the court included:
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> (1) Whether there is sufficient evidence upon which to make the relevant decision;
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> (2) Whether the proposed evidence (which should be available at least in outline) which the applicant for a full trial wishes to adduce is likely to affect the outcome of the proceedings;
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> (3) Whether the opportunity to cross-examine the witnesses for the local authority, in particular in this case the expert witnesses, is likely to affect the outcome of the proceedings;
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> (4) The welfare of the child and the effect of further litigation – whether the delay in itself will be so detrimental to the child's well-being that exceptionally there should not be a full hearing. This may be because of the urgent need to place the child, or as is alleged in this case, the emotional stress suffered by both children, and particularly D.

> (5) The prospects of success of the application for a full trial;
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> (6) Does the justice of the case require a full investigation with oral evidence."

It is my view that these considerations were plainly not fully taken into account by the court. A schedule of contact visits was furnished on the morning of the hearing. I accept the proposition of Ms Walsh QC, who appeared on behalf of the mother, that this required detailed instructions to be taken (which was not possible in the time available) and which may well have merited its accuracy being tested by cross-examination in light of those instructions. This is even more forceful in the case of the father who was not even present in court and therefore had no opportunity to comment on or give instructions concerning this schedule. Consequently I am obliged to depart from the learned judge when he concludes in the penultimate paragraph of his judgment that all the points relevant to the mother's case on contact were canvassed and clear from the papers. This simply cannot be so when counsel unequivocally submit on behalf of both parents that they had been unable to obtain instructions. One cannot say whether or not these instructions might or might not have made a different conclusion possible in light of what would have been put before the court. In short the justice of the case required that these parents be afforded the opportunity to have their case fully heard. It is vital that parents be involved fully in the court process so that they are entitled to feel, whether they win or lose, that they have been given a full and proper hearing. Accordingly it seems to me that in a case

where one party, namely the father was not present because he thought it was a directions hearing, and where the mother is represented by counsel and has indicated that she has not had a proper opportunity to take instructions, it was inappropriate to make an order altering contact. The whole situation was compounded by the fact that the guardian, through illness, had not been in position to make the enquiries necessary to enable her to form a view as to the proposed contact arrangements. I have therefore come to the conclusion that the court in this case failed to afford the parties a reasonable opportunity to make representations and accordingly there was a failure to invite the parties to the proceedings to comment on the arrangements for contact in the real sense.

For these reasons therefore, I consider that an appeal must succeed and the order of the court be set aside. I remit the case to the Care Centre for rehearing. I consider that there is degree of urgency in this matter and that the case should be determined as speedily as possible.