

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BRENTFORD COUNTY COURT
(HIS HONOUR JUDGE POWLES QC)

Royal Courts of Justice
Strand
London
WC2A 2LL

3 December 2014

B e f o r e :

**LORD JUSTICE CHRISTOPHER CLARKE
LORD JUSTICE PATTEN
and
LADY JUSTICE MACUR**

IN THE MATTER OF R (A CHILD)

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(Official Shorthand Writers to the Court)

The Appellant appeared in person
Mrs A Small (instructed by Direct Access) appeared on behalf of the Respondent

JUDGMENT

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LORD JUSTICE CHRISTOPHER CLARKE:

1. The appellant is the father of R, who was born on 18 May 2002 and is thus now 12 and a half. The father is a child social worker. He appeals from a judgment of His Honour Judge Powles QC given on 20 January 2014. By his order of that date, the judge decided:
 - i) that R should reside with her mother, the respondent;
 - ii) that there should be no order for contact with her father; and
 - iii) that the previous orders made for indirect contact should be discharged.

The order provided that R might make such contact with her father as she considered appropriate, and required the mother to support and assist the child should she wish to make contact with her father. It also contained provision for the sending of school reports and photographs each year and keeping the father informed if R was seriously ill and informing the father of her address.

2. The history of the case is this: when R was born in May 2002, the parties were not married. They had met in the spring of 2001 and they married in September 2003. In May 2002, they were both living at the mother's father's house in Tottenham. Thereafter in 2003 they lived together in two other different places in Tottenham. They separated in November 2004. In late 2004 or early 2005, the mother moved to another dwelling in the Tottenham area, and in February 2005 she moved back to live with her own mother in Ealing and withdrew R from a nursery in Tottenham. The pretty regular contact that the father had been having with R immediately after the separation greatly reduced and then stopped in April 2005. According to the father it was because the mother told him he was no longer to see her. The mother applied for divorce in March 2005 and the divorce finally went through in February 2008.
3. In May 2005, an agreement was made at the Waltham Forest Magistrates' Court, providing for staying contact for one night every other weekend and a phone call every other day. The last direct contact between father and daughter was in about September 2005. A hearing was set up at the Brentford County Court, to which the proceedings had been transferred, for 22 September 2005 to consider contact, but the father did not attend. A fresh date was set for 12 January 2006. The father did not attend then and his application was dismissed. It appears that he did not hear about the dismissal until October 2007, when he wrote to the court complaining that he had not received any correspondence and was told that the case had been dismissed in February 2006.
4. Thereafter, he did not take any steps to seek contact with his daughter until he started the current proceedings on 24 May 2012, save that on 16 June 2011 his solicitors wrote to the mother to say that he wished to reestablish contact. They made a referral to mediation which the mother declined on the grounds, so she claimed, that he had not been honest about the reason for contact ending.
5. Meanwhile, the father had had two children, a boy and a girl, whom R has never met. The news of that event was contained in an undated letter to R, in which the father apologised for all the years that she had not seen or heard from him, and in which he said that there was no answer that could justify his absence from her life. He said that he should have been there for her and apologised for the missing years. R was not shown this letter.
6. On 2 August 2012, the court made an order for indirect contact only, by way of cards to be sent monthly for eight months and thereafter fortnightly, and small gifts on alternate months, together with Christmas and birthdays. The mother was required to write for the father a blog about R so as to inform him as to the effect of his cards. The interim contact order was continued on 14 June 2013, with a date for further consideration of 24 September 2013. That hearing had to be relisted for 20 January 2014 because the mother attended in the afternoon when the case was listed in the morning. The response to the father's indirect contact was usually for him to be told that R had put his card unopened

in the recycling bin. R's attitude, as expressed in the mother's reports, was of hostility to receiving these cards.

7. At a review hearing on 14 June 2013, the court commissioned a report on R's wishes and feelings, given 12 months of indirect contact. This order was made in response to the allegation that the views being expressed by R were not in truth her own but those of her mother. R met with Ms Corrigan, the Cafcass officer, on 21 August 2013. Her report of 23 August 2013 includes the following passages:

"6. R said the only thing to cause her unhappiness and uncertainty in her life has been the indirect contact from her father during the past 12 months. She was very clear that it has caused her to feel unsettled and worried, and she said she is certain that she does not want to see her father or to continue the indirect contact. She told me several times that she had not been influenced by her mother, who continually tells her that she will support her decision, and that if she is happy to see her father, she must feel free to do so.

7. ... I had no sense that she had been coached or influenced by the mother in any way.

...

9. R responded to the question 'What makes me feel safe?': 'Being with mum, who would never hurt me and always wants the best for me'. She replied that she feels unsafe when she thinks about her dad.

...

11. To the question 'What makes me sad?' she replied 'When I get letters from my dad and when I have to talk about him'. She feels bad when she 'thinks about dad' and what might happen and worries that he might take her away from her mummy.

...

14. She said of course she would have wanted a father who loved her and lived with her and cared for her when she was growing up, but that was not possible and too much time has gone by and he has another family. Nevertheless, she said cannot see how seeing him would not turn her life upside down."

Ms Corrigan reported that R was adamant that she did not wish to have contact with her father, and that she was saddened to see her obvious discomfort when talking about him.

8. At the hearing, the judge heard evidence from the father, the mother and Ms Corrigan. The father's case was that R's mother had given R no encouragement to see him because that suited her. He suggested that various expressions attributed to R in the welfare officer's report appeared to be of adult origin. The mother said that she had never sought to prevent R from seeing her father and had always said she would support her daughter in whatever decision she made about contact, and that she had not actively tried to turn R against her father.
9. The report expressed the view that the benefit of R growing up with her father and the other children in her life would be far outweighed by the unhappiness and upheaval contact may bring into her life; and that for R, who was then about to go to high school,

to have to begin a painful journey to reestablish a relationship with a father she did not know or want to see, and other children to whom she felt no attachment, would be damaging to her overall wellbeing. The recommendation made was that there should be no order for contact and the father and mother should both assure R that the door was open to her to make contact with the father in the future when she was ready and when she chose to do so.

10. The judge accepted that there was nothing to suggest that either mother or father were anything other than loving, capable parents who had the best interests of their child at heart. He did not think that R would come to any personal or physical harm if the court were to order contact. However, it was plain that the resumption of contact was something the child did not wish to happen and which in the opinion of Ms Corrigan would have a depressing effect on her. In oral evidence, Ms Corrigan had told the judge that if R would be asked to manage contact, she would think that she had not been listened to and that she might retreat into herself and be difficult about many things.
11. The judge considered various aspects of R's feelings as recorded in the report. He thought there was no real reason for her feeling unsafe when she thought about her dad, other than that she felt secure with her mother and knew where she was. He could discern no real reason for her worry that her father might take her away from her mother other than her own imagination about the unknown. The judge accepted that the mother really meant it when she said she did not coach her daughter, and that she had said that when R made up her own mind she could go and see her father and that her mother would support her.
12. The judge did not think it appropriate to leave a child with the burden of decision as to whether or not to see her father. Children needed, as he put it, positive encouragement, not static support for their own views, and they needed to be told at a young age what they should be doing for their own good, because when they came to be adult and saw things differently it would be too late to undo the situation. He recognised that that was what the father was urging upon him, contending that the short lived trauma of getting to know R over a period of months would soon dissipate when she saw the decent fellow that he was, as the judge expressly found him to be.
13. Whilst the judge saw the strength of these considerations, he took the view that he must have regard to the report of an experienced Cafcass officer of many years' standing and her advice. In relation to the checklist contained in section 1(3) of the Children Act 1989, he held that it was clear to him:
 - a) that R's wishes and feelings were that she should not see her father for now;
 - b) that her emotional needs now that she was approaching puberty and in the future were probably neutral in effect;
 - c) that a change in circumstances could mean that R might feel that adults did not listen to her, which might have unpredictable consequences; and
 - d) as to harm, she had suffered harm in being separated from her father for so long, such that she was not inclined to see him.
14. The judge made no explicit reference to section 1(3)(g), which requires the court to consider the range of powers available to the court under the Act, other than by saying that he had full powers to deal with the case appropriately. In particular, he did not in

terms consider the possibility of supervised direct contact. He therefore came to the conclusion that he must follow the recommendation of the court welfare officer. He said that he did so with a heavy heart, because he saw the father's point:

" ... that if only she could take a few initial steps towards a meeting, that would bring her the reassurance that she craves, would dispel worries and concerns and everything would be fine."

15. That, however, as he said, involved a risk, and the safe course was to follow the recommendation and to accept, as he did, the mother's assurance that she would support R in contact. He said that he would like her to do more by way of positively encouraging contact, rather than it being something R could take or leave as her choice. He thought it would help R if a residence order was made, because that would show that she was going to remain with her mother, and she should continue to know that her father remained interested in her, and that the father be kept informed about her so that he retained an interest in her. Accordingly, he made the orders to which I have referred.
16. The applicable legal principles are clear. First, the welfare of R is the paramount consideration for the court. It takes precedence over any other. Second, the court has in a series of cases stressed the importance of contact between parent and child as a fundamental element of family life, which is almost always in the interests of the child, and which is to be terminated only in exceptional circumstances, where there are cogent reasons for doing so and when there is no alternative. Contact is to be terminated only where it would be detrimental to the child's welfare. The judge has a duty to promote such contact and to grapple with all available alternatives before abandoning hope of achieving some contact. Contact should be stopped only as a last resort and once it has become clear that the child will not benefit from continuing the attempt. The court should take a medium to long term view and not accord excessive weight to what appear likely to be short term and transient problems. The key question is whether the judge has taken all necessary steps to facilitate contact, as can reasonably be demanded in the circumstances of the particular case; *Re C (a Child)* [2011] EWCA Civ 521.
17. These principles reflect the jurisprudence of the Strasbourg court, which in many cases has emphasised the fundamental right of parents to have measures taken with a view to their being reunited with their children, and the obligation of national courts to take such measures. That obligation is not however absolute. The best interests of the child may be threatened by contact with the parent, and the rights of the non-resident father have to be weighed against the child's rights under Article 8, in which case it is for the national court to strike a fair balance between the respective rights.
18. The effect of the judge's order is to preclude all contact between father and daughter, even indirect, unless R should choose otherwise. It contains no provision which might encourage or facilitate contact in the absence of R making that choice. Such an order is rightly described as Draconian.
19. The matters which appear to me to be of particular significance in the present case are the following: first, the period in which the father had had direct contact with R was whilst she was very young and was itself very limited, lasting from her birth until at the latest September 2005, when she was 3 and a half. Second, the interval between contact ceasing and indirect contact restarting has been very long, from September 2005 to

August 2012, some seven years. Third, the indirect contact which then took place has not been productive. The position now is that the father has not seen R for over nine years. Further, the judge has found that R's reaction was not something which her mother had coached her to have, although she may well have picked up her mother's negative feeling. Fourth, R, who was described by Ms Corrigan as an intelligent and competent 11 year-old, is of an age where her views require consideration.

20. There are, however, countervailing considerations. First, this is not a case where R has been maltreated by her father, whom the judge has found to be a decent man. Second, the apprehensions and fears expressed by R are not based on any particular incident or any experience of actual contact. They are the understandable feelings of a girl who has not seen her father and has lived with her mother for years. It may be, as the judge recognised in terms, that if contact was resumed gradually these fears and apprehensions would dissipate. Thirdly, no real investigation has taken place of what steps could realistically be taken to promote or encourage direct contact between father and daughter. That may involve careful preparation of both her and her father, supervision of any contact, and other professional assistance. Lastly, whilst initiation of contact in present circumstances inevitably involves a risk, it may not be without reward. The risk is relatively short term. If contact cannot work, some harm may have been done to R in the attempt. If contact could have been made to work but is never tried, the long term harm of her having lost all contact with her father may be irremediable.
21. In short, it does not seem to me that the judge has grappled with available alternatives, particularly when he did not have before him any evidence of the steps that could or might be taken to promote contact. It does not seem to me that the court was driven to conclude that the child would not benefit from continuing the attempt at contact, or that it had reached the position of last resort, or that there was no alternative other than the making of the order that was made.
22. Accordingly, I would allow the appeal and set aside the order for no contact. I would direct that the father's application for direct contact should be remitted to His Honour Judge Powles QC and that the case be listed before the judge for a case management hearing before 22 December 2014 for directions as to the filing of evidence relating to local services, support and assistance which may be deployed, and the facilities available, to enable the reintroduction of the child to the father in direct supervised contact on up to three occasions, and thereafter reports of such meetings to be filed. The purpose of taking this course is to ensure that the court takes every step that can reasonably be demanded to facilitate contact in fulfillment of its duty to promote that if it can.

LADY JUSTICE MACUR:

23. I agree.

LORD JUSTICE PATTEN:

24. I also agree.