



IN THE COURT OF PROTECTION

No. COP11633829

Royal Courts of Justice

Wednesday, 26<sup>th</sup> January 2011

Before:

MR. JUSTICE CHARLES

BETWEEN :

A LOCAL AUTHORITY

Applicant

- and -

PB & P

Respondents

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**J U D G M E N T**

(As approved by the Judge)

MR. JUSTICE CHARLES:

1. This judgment is my second judgment in this case. It relates to interim issues. When appropriately anonymised, this judgment can be treated as a public document.
2. Having reached the common ground that the hearing could not be treated as a final hearing, the live issues were confined to those relating to interim contact and, in particular, whether there should be overnight stays of DB (P) with his mother, the first respondent. In that context, I heard evidence from a psychiatrist who has reported, an independent social worker who has reported, the manageress of the care home where DB is presently living and from his mother.
3. The evidence of the psychiatrist and the independent social worker was to the effect that, before there was a move towards overnight staying contact, there needed to be a further psychiatric evaluation of the mother. This was because an earlier report obtained in the proceedings in March 2009 raised points concerning the impact and effect of the mother's drinking, either shortly before the relevant examination or over a much longer period of her life, and also issues relating to her ability to process information, which was described in the report as impairment. But, as I read the report, it does not raise any issue relating to her capacity to make decisions relevant to this litigation and its underlying subject matter, and it was not submitted that it did. The potential problems identified in this report are mentioned in other reports and the issues raised at mediation that I have seen, but have not, for example, been flagged up as a factor which either the local authority or the Official Solicitor on behalf of P, or indeed the mother were relying on in the proceedings to any great extent. The emphasis placed on them in oral evidence was greater than that given to them in the documents, but I accept that that change can regularly happen as a consequence of discussion before a hearing or during questioning.
4. The problem that would have existed at a final hearing in the context of that evidence is that it would have meant that, if it had been accepted, there would have been a need for further evaluation of the mother before any change could take place, either in respect of residence or contact.
5. An additional factor raised (and this is at the heart of a number of disputes in this case) related to the relationship between the mother and the local authority, and thus, the ability of them to work together. Other points that were raised, but which seem to me to be of less importance in respect of interim contact, are DB's feelings and wishes, and a staged increase in the contact. Staged increases, it seems to me, relate to the wider issue of a change of residence, rather than interim contact.

6. DB's wishes and feelings are naturally relevant but nobody is suggesting that a discussion which relies upon his capacity to process information is appropriate. What has to be assessed and considered are his reactions to contact and his responses to attempts to get him to understand through appropriate language what is intended. This flows from the common ground in the evidence concerning the degree of his understanding of his care and contact regime; for example, he knows when he is going to see his mother, he looks forward to it, he enjoys it, and can express likes and dislikes.
7. The divide between the parties in argument was effectively that, on behalf of the mother, I was being urged that there should be a move towards overnight contact for two reasons; one, as a matter of procedural and substantive fairness, so that that evidence was before the court, and the other on a straightforward best interests approach. The way it was put in the application was that it should happen as soon as is practicable, and be as frequent and for such duration as was appropriate to promote DB's best interests. That dictated the line of questioning to the relevant witnesses, and flowed from the opening positions of the parties.
8. However, when it came to final submissions, counsel for the mother indicated that it was accepted on behalf of the mother that there was force, in particular, in the point that the first three of the building-blocks identified in the oral evidence to commencement of overnight contact; namely the need for a re-evaluation of the mother by a psychiatrist. The next building-block was a need to put in place and agree a support system for overnight contact, which would involve a person employed at the care home, or some other person, being in the house overnight to provide support. The next was work on explaining to DB that he was going to have overnight contact and why this change was being made and a system for gauging his reactions to that.
9. It was submitted that, as in particular the first two of those building-blocks were not now in place, the mother was no longer pressing for overnight contact. Rather, the common ground had been reached (as reflected in the draft order put before me) that the system that is presently in place, which is effectively an open door policy, providing that appropriate arrangements are made so as not to interfere with DB's other activities, for the mother to visit DB at the care home, should continue and that there should be an increase from the present one visit a week by DB to his mother's home to generally two visits a week for about one and a half hours each.
10. DB has been visiting his mother at home for some time once a week. It is common ground that that contact has gone well, and I will come to a caveat on that in a moment. It has gone well, looked at from DB's perspective. He has plainly enjoyed it. He plainly expects it. He looks forward to it, and indeed, the manager of the care home described him as being excited by it.

11. His mother has supported that contact, and she plainly enjoys it too. The caveat I raise is that her evidence made it clear to me that understandably, given her stance that DB should return home, she did not think it was nearly enough. But, to her credit, she has taken part in that contact and it is common ground that her son enjoys it. It is also the case that she has taken part appropriately in discussing matters with the care home, and it is common ground that her visits to the care home are enjoyed by her son and that there is an exchange of views between her and the care home, which certainly those at the care home have, on occasion, found to be helpful. The only problems relating to visits to the care home have been those relating to visits by DB's sister, but that is not an issue that is before me today.
12. The issue for me is confined to interim contact and, it falls to be considered against the backdrop of the rival contentions that, at the end of the day, DB may remain in the care home and/or he may go home. In that context, I accept that within a best interests determination the fairness point that was raised on behalf of the mother arises. It was that overnight contacts could be informative and, therefore, it would be in DB's best interests for them to take place, because then the court would be better informed than it would be otherwise.
13. Counsel for the mother understandably was not prepared to accept that the present position advanced on behalf of the mother should have the consequence that, if at a later stage, either before or at the final hearing, the two building-blocks relating to psychiatric evaluation and the identification of the support details were in place, he would not be submitting that as a matter of fairness no final decision should be made until there had been overnight stays. He did not expressly ask for permission to seek a further assessment from the relevant psychiatrist. Also, he did not expressly ask for a direction or indication that steps should be put in place to deal with building-block 2; i.e. to create a situation in which the relevant support would be available overnight.
14. In my view, it would be wrong for me to leave matters in that state of suspension and, in managing this case, I need to determine whether or not, for the purposes of enabling the court to reach conclusions on the residence issue, those building-blocks should be put in place and, if they are put in place, whether there should be interim overnight contact.
15. For this purpose, I am simply going to assume that the psychiatric re-evaluation will not lead to factors which would point against such overnight contact. I propose to look at the question by reference to the implementation of a support system as envisaged by building-block 2 and the question whether overnight contact, if it takes place, is going to provide any real assistance to the court in reaching its decision on residence. A significant factor in that exercise (on the hypothesis that the public law argument is not the one that prevails in respect of

the provision of additional support at home) would be an assessment of the ability of the mother and the relevant public authority to cooperate persistently and consistently over a significant period of time.

16. However, I focus at the moment on the issue whether or not the nuts and bolts of interim contact could be put in place. It seems to me that it is likely that the mother would comply essentially with anything that was put in place. But, having heard her give her evidence, it does not seem to me that that compliance would be on the basis of an understanding or acceptance of the arguments that the support was needed. Rather, it would be because she had to agree to it, and go along with it, to get the overnight contact.
17. Further, it seems to me, on the assumptions that the nuts and bolts were to be put in place, that the overnight contact took place and that it was successful, that that would not add anything of any significance to the evidence before the court to enable it to reach a properly informed decision on whether or not DB should return home. So I reject the procedural and substantive fairness argument advanced on behalf of the mother.
18. But I should also consider whether in DB's best interests that, whatever the result on the residence issue, progress should be made on this aspect of the case at this stage. A common theme has been one that contemplates and suggests a move towards overnight stays, albeit that, at points within the process, it has been recognised that an essential factor concerning the nature and frequency of such contact and when it should be started is where DB was and would be living.
19. The evidence, from in particular the independent social worker, but also from the manageress of the care home, both of whose evidence I found helpful and impressive, is that DB has made remarkable progress at his present placement. The mother did not dispute that that was the true view of both those witnesses, but expressed some doubt about it, and undoubtedly there was an implication in her evidence that she was troubled that the methods that had been employed in reaching that result were not appropriate.
20. One of the major features (and this is common ground) is that DB at the first residential care home, and at home, had considerable difficulties with his sleep patterns, and would become disturbed at night. The manageress of the care home described it essentially as, if he had a good day, he would, it seems, talk to himself and be happy, whereas if he had a poor day, that could result in distress in the middle of the night. His mother accepted that DB's sleep pattern at home was difficult, and that, as the years went by, he was not sleeping during the night.

21. It is, as I understand it, common ground between DB's mother and the manageress of the care home and the independent social worker that it is very important that DB has a structure to, and stability in, his life, and appropriate support, matched by activities which he enjoys. As to this, it seems to me that the mother has years of experience and there is no divide between her and the manageress of the care home as to things that her son enjoys. Music is one of them. Important to that overall aim, it seems to me, is his sleep pattern.
22. The two themes of the evidence of the independent social worker, with whom the psychiatrist agreed, were the risk of disturbing the remarkable progress that DB had made at the care home, and the question posed as to who would benefit from interim overnight contact. To my mind, the answer as to that question is DB's mother, rather than DB. DB's understanding of such overnight contact is a matter of speculation. On an interim basis, it seems to me that the prospect that, by staying overnight, DB may become confused and, therefore, upset and, therefore, take a backwards step is a real risk that is not matched by any benefit that it would give to DB in terms of his overall stability and happiness. That distinguishes it from daytime contact, which clearly has been going well.
23. The other factor in that context and this was part of the theme of the evidence of the manageress of the care home (who, if I may say so, gave helpful and constructive evidence and indicated that practical steps to achieve overnight contact would be put in place and would be cooperated with by the care home, albeit that the detail of that was not examined) was that overnight contact carried with it a real risk that the significant progress that had been made (and I accept has been made) relating to DB's sleep pattern could be undermined.
24. I agree with that. That does not mean in the long-term that that risk should not be taken, if it was decided that he should not return home. Alternatively, if it was decided that he should return home it seems to me that that would be highly likely to involve a staged process including overnight stays. But, in the context of interim contact, it seems to me that the balancing exercise I am bound to carry out comes down firmly in favour of there being no overnight contact for the reasons I have tried to set out.
25. I repeat that that does not mean in the long-term that there should not be overnight contact, should DB's residence be at the residential care home. Indeed, it has consistently been the position of the local authority, the Official Solicitor and the experts that that is something which should be considered, the general consensus at present being that it should be linked to important days in the calendar to assist a proper understanding of it by DB, and hopefully his mother, that his home has become the residential care home and he is obtaining important emotional support and other support from his mother through contact. How much he will understand of that is not easy to predict.

26. But, on that best interests approach and on the approach by reference to procedural/substantive fairness, to my mind, it would not be appropriate for there to be overnight contact in the interim period leading to the final hearing. Therefore, it is not necessary or appropriate for time and effort to be spent to identify, at this stage, the nuts and bolts of the support that would be required to support such interim contact, save in the different context of what should be put in place after the final hearing, because at the final hearing the issue concerning whether, when and how there would be overnight contact having regard to where DB will be living will probably be a live one.
27. Equally, in the context of interim contact, I see no necessity for a re-evaluation by the psychiatrist. But, for the same reason and more generally, if his view is likely to be a factor that the court is going to be invited to consider in determining at the final hearing where DB's residence should be and/or issues relating to contact, then, it seems to me, that the existing report does need to be updated, and I give the relevant permission for that to take place.
28. That, I think, deals with the issues before me, other than the detail of the directions that need to be given in this case. I do not propose in an extemporary judgment of this type to seek to set them out in detail. Rather, it seems to me, that they should reflect the points I have made in my earlier judgment and, therefore, should cover the position relating to the options that the local authority is prepared to put on the table. In the context of contact, as I have just indicated, that would include the mechanisms for overnight staying contact, if that is something that they are contemplating.
29. If the decision of the local authority (as I understand it is likely to be) is that they would not put forward as an option (and would maintain that they could not be compelled to put forward as an option) a package of support for DB at his home, the local authority should be considering procedural fairness issues as well as substantive issues in the context of the public law issues that may arise.
30. It may be determined, that the issues relating to the rival packages of care, or some of them, are not to be governed by public law and that, in effect, within the best interests jurisdiction the court is being asked to invite the local authority to reconsider the package of care, or to take a course that effectively compels or puts pressure on the local authority to do this. It follows that the make up of the care packages it is being suggested by the mother should be provided need to be addressed by the mother and by those who represent DB and the local authority.
31. Next and importantly, the general approach I have indicated as to the identification of facts that the parties are seeking to prove, and facts which they are saying need not be gone into by the court need to be identified. At this stage, I do not think I need to go further than that.

32. The present draft order takes a slightly different approach. I invite counsel to reconsider and redraft it. I have no problem with paras.5, 6 and 7 of that draft. It is really 8 and 9 that need altering. So far as hearing dates are concerned, in argument, a good point was raised that, in setting a time estimate, you have to consider what the issues are and who the witnesses are going to be. Sometimes, however, a guesstimate has to be made. At this stage, I propose to do that. I think that the relevant dates should be taken. It should be a three day minimum, if it is available, in June. If more time is available in June the estimate should be five days, at this stage subject to review.
33. I am told that I will be in a position to hear the issues as to whether or not there should be permission given in any public law challenge and then directions in both sets of proceedings on a date in April.

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