Neutral Citation Number: [2020] EWCOP 1

Case No: COP13431311

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/01/2020

Before :

MR JUSTICE MOSTYN

- -

Between :

A	**Applicant**
- and –	
B **C** **D** **LONDON BOROUGH OF ISLINGTON**	**Respondents**

- -
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Sophy Miles (instructed by **Miles & Partners**) for the **Applicant**
Alexis Campbell QC and Katherine Scott (instructed by **Mishcon de Reya LLP**) for the **Respondents**

Hearing date: 18 December 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MOSTYN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the incapacitated person and members of his family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Mostyn:

1. This case concerns a young man aged 20 who is severely impaired by autism. I will refer to him in this judgment as "D". I shall refer to the applicant as "the mother", to the first respondent as "the father". I shall refer to D's stepmother as "C".

2. D came into the care of the father and C seventeen years ago at aged three. He cannot be left alone unsupervised and requires constant, highly skilled therapeutic support. The support team is selected and co-ordinated by C. The father is a successful businessman and is able to provide a comprehensive package of financial support, with a contribution from the local authority, to enable the team to provide continuously for D.

3. The mother, who is subject to a civil restraint order, applies for permission to make a substantive application concerning the nature and quantum of her contact to D. On 16 July 2019 I granted her leave under the terms of the civil restraint order to make the application for permission. Under the terms of section 50(1) and (2) of the Mental Capacity Act 2005 the mother needs permission to make a substantive application as she does not fall into one of the categories where permission is not required set out in section 50(1). Section 50(3) provides:

> "In deciding whether to grant permission the court must, in particular, have regard to –
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> (a) the applicant's connection with the person to whom the application relates,
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> (b) the reasons for the application,
>
> (c) the benefit to the person to whom the application relates of a proposed order or directions, and
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> (d) whether the benefit can be achieved in any other way."

4. A permission requirement is a not uncommon feature of our legal procedure. For example, permission is needed to make an application for judicial review. Permission is needed to mount an appeal. Permission is needed to make a claim under Part III of the Matrimonial and Family Proceedings Act 1984. In the field of judicial review, the permission requirement is not merely there to weed out applications which are abusive or nonsensical: to gain permission the claimant has to demonstrate a good arguable case. Permission to appeal will only be granted where the court is satisfied that the appellant has shown a real prospect of success or some other good reason why an appeal should be heard. Under Part III of the 1984 Act permission will only be granted if the applicant demonstrates solid grounds for making the substantive application: see *Agbaje v Akinnoye-Agbaje* [2010] UKSC 13 at [33] per Lord Collins. This is said to set the threshold higher than the judicial review threshold of a good arguable case.

5. There is no authority under section 50 giving guidance as to what the threshold is in proceedings under the 2005 Act. In my judgment the appropriate threshold is the same as that applicable in the field of judicial review. The applicant must demonstrate that

there is a good arguable case for her to be allowed to apply for review of the present contact arrangements.

6. This is a case with a very lengthy and unhappy history. It is fairly summarised by Ms Campbell QC and Ms Scott in their skeleton argument, from which I quote:

> "6. This case has had an extraordinarily long and complex history. As [the father] records in his statement, there have been 46 court orders, with 19 hearings in the High Court and 2 in the Court of Appeal. To date some 31 judges have presided over the hearings. D has been almost continuously engaged in litigation since he was born. [The mother] has been involved in proceedings with respect to her children for more than 21 years. There have been three separate orders restricting the [mother's] ability to bring litigation by three separate judges in 2007, (Moylan QC), in 2011 (Wood J) and in 2016 (Mostyn J).
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> …
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> 13. [The mother] has made seven substantive applications for contact to D. The first was in 2002, which started when he was 3 years old. That required two psychiatric assessments and the involvement of the Guardian ad Litem. A final order was made by Coleridge J on 24 September 2002. Just seven months later, when D was 4 years old, [the mother] issued her second application for increased contact. That involved an investigation at the Tavistock Centre and the re-involvement of the Guardian ad Litem. Heather Swindells QC, sitting as a DHCJ, made a final order on 11 December 2003. The third application was made on 25 November 2005, when D was 6 years old. This time the application involved Cafcass, the Guardian ad Litem, an adult psychiatrist, a child psychiatrist and further investigations at the Tavistock. Moylan QC, sitting as a DHCJ, gave a final order on 13 March 2007, including the first s.91(14) restriction, which was imposed to last until March 2011. On 7 May 2005, when D was then aged 10, [the mother] issued her fourth substantive application for increased contact. In order to consider whether leave should be granted, investigations were carried out by the Guardian, a child psychiatrist and Cafcass. HHJ Wilcox refused leave to apply on 3 August 2009. A fifth application was issued by [the mother] on 13 November 2010 (the second application issued within the s.91(14) restriction), when D was aged 11. Further psychiatric assessments were carried out and the court was assisted by Cafcass and the Guardian. After a 7-day hearing, Wood J handed down a final judgment [on 2 November 2012] with the second s.91(14) restriction, this one lasting until D was 18 in 2017. On 5 January 2016 [the mother] made her sixth application for contact. Her permission hearing was heard by HHJ Richards, sitting as a DHCJ, without notice to [the father] or C, who gave permission and allowed an increase in contact.

> He rescinded his order on 8 January 2016 after [the father] and C attended court on short notice. This most recent application is the seventh substantive contact application that [the mother] has made."

The present regime of contact was fixed by Mr Justice Wood on 2 November 2012. It amounts to four occasions of contact each year at quarterly intervals, for two hours on each occasion, taking place under supervision. That regime was confirmed by me on 20 December 2016, when I also made injunctions controlling the mother's behaviour in relation to D and his family.

7. The mother's ambition is set out in her solicitors' letter written as long ago as 3 November 2016. There, she states that it is her view that the contact should be increased to fortnightly; that it should be unsupervised; and that it should take place in her own residence. Miss Miles, who has argued the mother's case eloquently and with circumspection, recognises that this ambition is completely unrealistic. Nonetheless, she argues that with the attainment by D of the age of majority, and with the passage of time generally, now is the time when there should be a further full welfare investigation as to whether the contact arrangements should be altered.

8. The father's position is that has been no material change in D's circumstances since the contact regime was established, and certainly none since it was confirmed by me two years ago. It is not suggested by him that the mother behaves during the contact sessions other than appropriately and sensitively, nor that D does not derive some pleasure from the visits. Nonetheless he argues that contact is stressful for D and for his family members. He maintains that it is not arguably shown that D would benefit from any increase in contact. Further, he argues that the litigation process would be highly stressful both to D and his family members. Essentially, it is submitted that the present contact is as much as D and his family members can cope with. For these reasons it is submitted that the mother should not be granted permission to make her application.

9. During submissions I made it clear that were I to grant permission I would nonetheless endeavour to make the litigation process as compressed and painless as possible. However, it cannot be gainsaid that it will be lengthy and expensive. Steps will need to be taken formally to assess D's capacity, although the result of this is agreed by all to be a foregone conclusion. Steps will need to be taken to ensure that his voice is heard by the court. At the least this will mean inviting the local authority to appoint in his favour an Independent Mental Capacity Advocate. He or she will need to meet and get to know D and will have to file evidence. There will need to be evidence from the local authority as to whether their present care plan should be altered. There will need to be evidence from the father, the mother and C. There will need to be evidence from the present caring team. There will need to be a final hearing, probably lasting at least two days, at which oral evidence will be given; that would be unlikely to be concluded before next summer.

10. I do not place any material weight on the attainment by D the age of majority. His father and C told me that he has a mental age of about seven years. Symbolism aside, his attainment of majority signifies nothing. I do not agree that because this arbitrary chronological threshold has been passed that D is entitled to be afforded more respect to his right to autonomy than prevailed in the period leading up to his 18th birthday.

The decision I have to make is whether a good arguable case has been shown that it is in his best interests for there to be a full welfare investigation of the current contact arrangements.

11. The evidence that has been filed clearly shows that D expresses worry to his carers prior to contact visits taking place; and that he exhibits distressed behaviour prior to and after such visits. This has included obsessively lining up all his toys and other belongings, teeth-grinding, eye-closing and compulsive masturbation.

12. I do not dispute that the evidence also shows that to some extent D has enjoyed the contact sessions with his mother.

13. I apply the same standards to this application as I would if I were hearing an oral inter partes application for permission to seek judicial review. I cannot say that I am satisfied that the mother has shown a good arguable case that a substantive application would succeed if permission were granted. Fundamentally, I am not satisfied that circumstances have changed to any material extent since the contact regime was fixed seven years ago and confirmed by me two years ago. I cannot discern any material benefit that would accrue to D if this permission application were granted. On the contrary, I can see the potential for much stress and unhappiness not only for D but also for his family members if the application were to be allowed to proceed.

14. For these reasons, the application is refused.

15. That concludes this judgment.