Neutral Citation Number: [2024] EWHC 1156 (Fam)

Case No: CV22P00393

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/05/2024

Before :

MRS JUSTICE LIEVEN

- -

Between :

J & K

Applicants

and

M

First Respondent

and

F

Second Respondent

- -
- -

Ms Beth Hibbert (instructed by **Creighton & Partners Solicitors**) for the **Applicants**
The First Respondent represented herself
The Second Respondent represented himself

Hearing date: **1 May 2024**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 10 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LIEVEN

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 children and members of their 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.

Mrs Justice Lieven DBE :

1. This is an application by the paternal grandfather, J and step grandmother, K, ("the Applicants") for contact with A, aged 6. The application is opposed by the M and supported by the F. The application was refused by HHJ Walker on 4 October 2023, but that decision was overturned by Mr Justice MacDonald on 5 February 2024 and the matter remitted to me as Family Presiding Judge for the Midlands.

2. The Applicants were represented by Ms Hibbert of counsel, the M and the F both appeared in person, the F by CVP link from HMP Long Lartin. I also heard from Ms Ali, a Family Court Advisor at Cafcass.

3. The M and F had a relationship and the M became pregnant. By the time A was born in December 2017, the F had been convicted of murder and sentenced to a minimum of 22 years in prison. The F will therefore spend the entirety of A's minority in prison. The M was convicted of assisting an offender by impeding his apprehension/prosecution in a murder case in 2018 when A was about 3 months old. She was not given a custodial sentence.

4. It is of relevance to understanding the emotional background to this case, that the F has a long list of previous and serious offences. There are 26 convictions for 37 offences, including sexual assault of a child under 13 (4 offences in 2009), possession of cannabis, battery (2012 and 2016) and common assault (2017). The police report recorded in an earlier Cafcass letter several "no further actions" for a broad range of other serious offences.

5. Between A's birth and the onset of the Covid pandemic in March 2020 A had regular overnight contact with the Applicants (approximately every fortnight), when the M was working on a Saturday night. All parties agree that this was a positive time for A who had a close and loving relationship with the Applicants and with other paternal family members. This contact stopped with Covid lockdown, then restarted in the summer of 2020, although perhaps less regularly, stopped again in the second lockdown, and then restarted in March/April 2021.

6. However, in May 2021 the F made an application to the Court for contact, his contact having stopped in March 2020. The M stopped contact with the Applicants in May 2021 and it is has not resumed since. Therefore, A has not seen the Applicants for approximately 3 years.

7. The M says that she stopped contact because she was so upset/concerned about what the Applicants had said in their statements in support of the F's application and her overall concerns about J's behaviour in respect of the F, and herself. Neither party has put those statements before this court. Ms Hibbert says, on instruction, that the statements were not filed until December 2021, so the M must have simply stopped contact because the F made an application. I cannot determine this dispute, but ultimately I do not consider it to be critical to the decision I have to make.

8. On 3 March 2022 HHJ Walker ordered that the F should have contact with A four times per annum. The order states in the recital *"the court was advised that the paternal grandfather was ready and willing to facilitate any contact directed between the child and his father".* Then at paragraph 21 it states:

> *"21. The following conditions apply to contact:*
>
> *a. The date for each contact session is to be agreed not less than 4 weeks in advance between the mother and the paternal grandfather;*
>
> *b. the paternal grandfather has agreed that he will be responsible for booking each contact session with the prison for the child;*
>
> *c. the mother shall ensure that the paternal grandfather has a copy of the child's passport in advance of each contact session in order to book the visits with the prison;*
>
> *d. handovers at the start of the and end of each contact will be at a place agreed between the mother and the paternal grandfather;*
>
> *e. the mother shall ensure that the child attends every contact session with his passport which must be in date and valid;*
>
> *f. the paternal grandfather agrees to return the child's passport to the mother at the end of each contact session."*

9. This is important because the M says that the contact was organised on a non-family day, which is why she did not let A go. J said in evidence that he did not organise the contact at the prison, because that had to be done by the F, and he denied knowing or having agreed to organise it. This either suggests that the F misled HHJ Walker in making the order, or that J is not now telling the court the full truth about what he agreed with the F. I can quite understand why the M found this "misunderstanding" both confusing and worrying. I note that J appeared to show no curiosity or remorse about the fact that HHJ Walker seems to have been led to believe that he would organise contact, when he says he had never agreed to do so.

10. In May 2022 the F applied to enforce the contact order because he said the M had not facilitated contact.

11. On 26 May a Cafcass officer, Ms Maisey, wrote to the Judge. That letter states:

> *"[O]n 02/03/22 Mr Shepherd [the F's probation officer] wrote to Cafcass to advise he was concerned that [F] and Paternal Grandfather had been discussing ways they could fraudulently evidence to the court that there was an established relationship between [J] and [A] {through fake cards/letters being sent}"*

12. On 22 July the Applicants applied for contact with A and permission to bring proceedings was granted on 16 November 2022. In October 2022 the F again applied to enforce the contact order. On 1 March 2023 the M agreed to take A to contact with the F during the Easter holidays and this contact took place at [a prison]. A has had contact with the F twice, and it has been facilitated by the paternal grandmother. The F's second set of enforcement proceedings were determined with no increased level of contact.

13. On 5 July 2023 the Cafcass s.7 report, authored by Ms Ali, recommended a reintroduction of contact with the Applicants, leading up to overnight contact once per calendar month.

14. On 4 October 2023 there was a final hearing before HHJ Walker at which she heard evidence from the Applicants, the M and the F, and from Ms Ali. She refused the application for direct contact between the Applicants and A. The Applicants appealed that judgment on a number of grounds.

15. On 5 February 2024 Mr Justice MacDonald allowed the appeal on the first two Grounds of Appeal, which relate to the procedural fairness of the hearing before HHJ Walker. These Grounds concern the late service of a statement by the M and the failure of the Judge to give the Applicants sufficient time to read this and an opportunity to respond.

The evidence

16. I heard evidence from J, the Father, the Mother and Ms Ali.

17. J had put in two witness statements. He emphasised how close he and K had been to A before contact stopped and how he had had a good relationship with the M. He explained the benefits, as he saw it, for A knowing his wider paternal family and understanding his Afro-Caribbean heritage. He said he was pursuing contact because he thought A would enjoy it and it would be in his best interests.

18. The M has made a number of specific allegations about events concerning the Applicants. It is neither necessary nor proportionate for me to make findings of fact in respect of them. However, they are relevant to why the M opposes contact so strongly, so it is right that I record both sides' positions in respect of them.

19. J denied that he had discussed creating fraudulent cards or letters with the F. He said he would have had no reason to do so. He thought the prison officer had misunderstood a conversation about the F's possessions having been mislaid in a move between the two prisons.

20. He denied that he had given the M a mobile phone in 2017 to contact the F, in breach of her bail conditions. Again, he said that there would have been no reason for him to do so, given that she already had a mobile phone.

21. J named a family friend, B, on the C100 as A's godfather. I understand B to be a fairly prominent member of the local community. It was quite unclear to me why he had done that save perhaps to seek to influence the M by use of B's name. The M had never been asked to agree to B being A's godfather and, until she got the C100, knew nothing about the suggestion that he was. J said that the F had told him B was the godfather, and he never thought to ask the M about whether she knew or had agreed to B being a godfather. It must be remembered that this is in the context of the F already having been in prison throughout A's life, and the M therefore being the child's sole carer. Again, J seemed to show little or no curiosity or, in my view, genuine remorse about the fact that he appears, on his evidence, again to have been misled by the F.

22. In my view, the whole godfather incident shows at a minimum J's lack of respect for the M, and failure to understand how upsetting this was for her.

23. J was extremely keen to say in his evidence that he cared for the M and all he wanted was a good relationship with her, and to be able to re-establish a relationship with A. I have to say that J's evidence in respect of his attitude to the M did not ring true. HHJ Walker had given the Applicants permission to send letters, cards and presents once per calendar month to A. However, they had not sent any presents or letters. When I asked why they had not sent A presents in order to try to re-establish some relationship with him, and regain the trust of the M, he immediately said he did not believe the M would pass them on. The M was clear, and I believed her, that she did pass on the cards.

24. My very strong impression was that under the superficially kindly language, J had as much hostility to the M as she had to him. He was extremely quick to defend the F; when I pointed to the long list of offences, his immediate response was to say correctly, but unnecessarily, that the sexual offences were when the F was a child. Both his evidence, and the various documents strongly suggest that J will defend his son and support his "rights" in respect of A, rather than have any understanding or insight into the effect that the F's murder conviction has had on the M, or inevitably in the long run, on A. I return to this in my conclusions.

25. The F had put in a statement and spoke fairly briefly over the video link. I did not permit him to ask questions of the M as he has no role to play in any contact between A and the Applicants. He too denied seeking to create fraudulent cards. He strongly supported the Applicants' case.

26. The M had made a number of statements and she gave oral evidence. The M, unlike the Applicants, did not have the benefit of legal representation. It was obvious that the M had found the proceedings and the almost endless litigation immensely draining and upsetting. She was a somewhat recalcitrant witness, in the sense that she made no effort to hide her dislike and distrust of the Applicants, and was inclined to just say no to questions. This was in part I believe a product of not having legal representation and therefore just saying what she actually thought, without the benefit of legal advice as to how to "nuance" her answers.

27. It is worth recording a part of the M's statement, dated 8 August 2023, because in my view it shows a child focused approach.

> *"13. With [A] having to now visit his birth father in prison it has been so confusing for him. I believe that [J] should show some consideration to [A's] needs and withdraw his application for contact. He should show commitment by sending cards or short letters etc for a period. Work can be done by [A's] school around his experience and wishes and feelings. This would allow [A] to get a more detailed understanding and not feel so confused like he is feeling now. [A] has already been forced to visit the prison, something which he was extremely anxious to do, to now be forced to spend time with people he hasn't seen for almost four years is unrealistic.*

> *14. I therefore do not agree with any direct contact between [J] and [A]. Twice monthly contact is quite simply intrusive. I ask that the Court does not make a Child Arrangements Order but makes an Order that [J] can send cards and short letters for a period of 12 months and shows that he is committed to forming a natural relationship. This could be followed with Video calls for a period of time. During this time [A] will be having direct contact with his birth father in prison as well as his paternal grandmother. The school are aware of the circumstances around this case, and they will be happy to undertake some direct work with [A] with their Pastoral support worker. My partner and I will undertake the [Family Court Adviser] recommendations around planning together for children programme. [The Applicants] could also show commitment and undertake this work.*
>
> *15. Following this, if arrangements cannot be reached then [J] could apply again to the Court for a Child Arrangement Order. I feel that this would allow [A] the time to learn why he has a father living in prison, understand more about the extended family through the work by Pastoral support and adults around him would have shown that they have the interests of [A] and not ulterior motives. [A] is struggling emotionally, he has had a major change this year and with another prison visit coming up at the end of August I believe the impact of him having more unfamiliar people thrown into his life will have a negative impact on him."*

28. I thought that the M was an honest witness. I also think that her overwhelming concern was what was best for A and trying to protect him from further upset. She did not seek to embellish matters, and for example over the Cafcass letter's reference to the probation officer, she said she did not know what had been said, she was simply relying on the letter.

29. She said that that she had lost all trust in the Applicants after they put in evidence in support of the F's enforcement application. As I have set out above, it was difficult to get to the bottom of this issue, but the M was adamant that that is what had led her to stop contact. I note in her original statement she raises concerns about JS's own parenting of the F, and A being exposed *"to the same environment his birth father was subjected to"*.

30. She said she was deeply upset by the Applicants putting B's name on the C100, when she had no idea he was supposed to be A's godparent, and there was no reason to put him on the form.

31. She was clear that the F had taken a mobile phone to her, to encourage her to make contact with the F in prison contrary to her bail conditions.

32. She said after the second contact visit to the prison A had started asking questions about the F and why he was in prison, and his behaviour at school and at home had become much more difficult. She accepted it is impossible to know why this is, but it seems unlikely to be a coincidence. She said she wanted the time and space for A (and herself) to deal with A having contact with the F, and learning about and coming to terms with, in an age sensitive way, his conviction.

33. She made it clear that she would find trying to support monthly contact enormously difficult. It can be seen from this that her position has somewhat hardened since her statement in August 2023. However, that is hardly surprising given the number of hearings and the apparent impact of the contact with the F upon A.

34. I note that J said that contact could be facilitated by the paternal grandmother. However, the paternal grandmother has not been asked and according to the M, the paternal grandmother lives some way away and is already finding facilitating the contact between the Father and A quite difficult. The sheer practicalities of managing contact where the M would find it so emotionally hard, have not been thought through by the Applicants.

35. Ms Ali is the Family Court Adviser appointed in the case. She has met A once, in July 2023. It was clear from her report that A is a happy and confident child, and the M has done a really good job with him.

36. She thought that it was in A's best interests to have a relationship with the Applicants and that it needed to be of a minimum frequency of monthly and be direct contact. She thought that A remembered his grandfather and that he had enjoyed his time with them. She plainly felt very strongly that for A to understand his "identity", particularly that of being a mixed race child with Afro-Caribbean heritage, it was very important that he had a relationship with the Applicants. She felt the Applicants could provide positive role models with a similar cultural identity.

37. I have to say that I thought that Ms Ali's report showed something of a lack of insight or understanding into the M's feelings. She said *"during this assessment [the M] has raised my suspicions as to her ability to promote A's paternal identity and relationships" ….. "the M presents with an unwillingness to resolve matters and reflect on her behaviour, appearing preoccupied in seeking to attribute blame on [the F] and [the Applicants]".*

38. I found these comments very surprising. The F is serving 22 years in prison for murder. In my view it is hardly surprising that the M finds it hard to "promote" A's paternal identity, and that she is somewhat preoccupied with attributing blame on the F. I suspect that most responsible mothers in this situation might feel rather similarly to this mother.

39. In my view, Ms Ali's report is also deficient in failing to consider the impact on A of forcing his mother to promote monthly contact, leading up to overnight contact, with the Applicants. The reality is, whatever the rights or wrongs, that this would be immensely difficult for the M and she will find it emotionally distressing. That will impact on A. This impact is not dealt with in Ms Ali's report.

The law

40. The principles I should apply are straightforward and emerge from the welfare checklist in the Children Act 1989.

41. Ms Hibbert refers to the following principles:

42. The Court of Appeal have confirmed that there is no presumption, as there is for parents, that a grandparent who has obtained the leave of the court to apply for a Child Arrangements Order should be entitled to contact unless there are cogent reasons for denying it to them *(Re A (Section 8 Order: Grandparent Application)* [1995] 2 FLR 153).

43. The court's paramount consideration is the child's welfare and the court should only make an order for contact between a child and their grandparents if it is in the child's interests for contact to take place. These principles are set out by Wall LJ in *Re W (Family Proceedings: Applications)* [2011] EWHC 76 (Fam) at [12]:

> *"Let me assure Mr. CHW and Mrs. BAW of some basic propositions. The first is that O and Y's welfare is the court's paramount consideration. Secondly, that judges do not deprive separated parents of contact with their children lightly or for no good reason. Thirdly, that children have rights, just as much as adults to respect for their family life. Fourthly, I will only make a contact order in their favour if I take the view that it is in the interests of the children for such contact to take place. I fully understand, as Mrs. BAW told me that she is "desperate" to see her grandchildren, But that is not the test. The test is whether it is in the interests of the children for such contact to take place, and as the later part of this judgment will make clear, the grandparents' wholesale support for their son and their hostility to the children's mother are strong pointers against contact."*

44. Per Munby LJ (as he then was) in *Re G (Education: Religious Upbringing)* [2012] EWCA Civ 1233, [2013] 1 FLR 677 at [26]:

> *"'Welfare', which in this context is synonymous with 'well-being' and 'interests' (see Lord Hailsham LC in In re B (A Minor) (Wardship: Sterilisation) [1988] AC 199, 202), extends to and embraces everything that relates to the child's development as a human being and to the child's present and future life as a human being. The judge must consider the child's welfare now, throughout the remainder of the child's minority and into and through adulthood. The judge will bear in mind the observation of Sir Thomas Bingham MR in Re O (Contact: Imposition of Conditions) [1995] 2 FLR 124 , 129, that:*
>
> *"the court should take a medium-term and long-term view of the child's development and not accord excessive weight to what appear likely to be short-term or transient problems."*
>
> *That was said in the context of contact but it surely has a wider resonance. ..."*

45. The court has made clear that a resident parent's hostility to a child's grandparents is not a sufficient reason to prevent contact between the child and the grandparents where other factors weigh in favour of contact. In *Re S (Contact: Grandparents)* [1996] 1 FLR 158, Wall J noted:

> *"Re D (A Minor) (Contact: Mother's Hostility) [1993] 2 FLR 1 is cited as authority for the proposition that the implacable hostility of a mother towards contact is capable, according to the circumstances of each particular case, of supplying a cogent reason for departing from the premise that a child should grow up in the knowledge of both his parents. But the rationale of that approach is that contact is to be denied because the child is put at serious risk of major emotional harm if the mother were to be compelled to accept a degree of contact to the father against her will: see the judgment of Waite LJ at pp7-8. In the instant case, as I have already stated, the judge found not only that the grandparents' case for contact had 'overwhelming merit', he also found as a fact that there was a risk of significant harm to the child if face-to-face contact was not established reasonably soon. Furthermore, he plainly took the view that the mother's attitude was irrational, not least because – in his judgment – 'she has rejected the views of all the professionals in the case', and there was no evidence that contact by the grandparents to K in the past had in any way been harmful to her."*

46. In *Re W (Contact: Application by Grandparent)* [1997] 1 FLR 793, Hollis J commented:

> *"[I]t would be nonsense in the long term for a child to be denied contact with his grandmother because of bitterness between the mother and the grandmother. Grandparents play an important role in children's lives, especially young children, and their influence is extremely beneficial, provided it is exercised with care and not too frequently."*

Conclusions

47. In making this decision I have to focus on A's best interests. I accept that it is, in some ways, quite a difficult balance. A had a positive relationship with the Applicants, particularly before Covid but continuing until contact stopped in mid-2021. I accept he probably has some memory of them, though less than he did when Ms Ali spoke to him in July 2023.

48. I also accept that there is a real benefit to A knowing his wider family including his paternal grandfather and step grandmother. This may be particularly beneficial given that they can show him the positive aspect of his Afro-Caribbean heritage. That may, although this is inevitably speculative, lessen the negative impact on him knowing that his father is in prison, and at some point being told that he is in prison for murder.

49. "Identity" is a somewhat nebulous concept, but I accept that as a broad generality having a good relationship with the Applicants may help A's sense of identity. However, this is not a case where if A does not have contact with the Applicants he will not know about his paternal identity. This is not the case of a child entirely removed from one side of his family. A has to visit his father four times per year, and he sees his paternal grandmother at least that often, although I note that his paternal grandmother is white. He therefore knows who his father is, and he knows about the paternal family.

50. There are in my view a number of factors that weigh strongly against contact. As I set out above, I do not think that J has much or any insight or empathy into, or perhaps even interest in, the M's feelings. He did not seem to feel that there was any burden on him to rebuild the relationship. He said that he wished to apologise to her and that he was being a good Christian towards her. However, in reality I think he has considerable animosity towards her.

51. This ties into him being a strong supporter of his son. Although this is in many ways admirable, I wholly understand the M's nervousness about what the Applicants may say to A about his father and his offending history. They offered undertakings not to speak about his offences. However, I think it likely they would seek to portray him in a good light, and to minimise his past behaviour. For a mother who is desperately trying to move on from a very dark period, it is obvious why this would be so worrying.

52. Both the Applicants, and indeed Ms Ali, seemed to feel the nature of F's convictions were almost irrelevant. For the M, trying to bring up and protect A, that cannot be the case, and is inevitably troubling in respect of what the Applicants may say to him. I am confident that J was seeking both to minimise the F's convictions, but also the chronological spread and thus the degree of potential parental responsibility involved.

53. It is not possible to get to the truth of some of the M's allegations against the Applicants. However, there is nothing unreasonable about her relying on what the probation officer said to Cafcass. I also agree with her that putting B on the C100 as a godfather was either grossly insensitive or designed to intimidate her. J never bothered to check whether the M even knew that B was supposed to be a godfather. He simply, according to his evidence, took the information from the F. This shows a lack of respect for the M which is striking.

54. I am not sure what happened in respect of the other incidents, but as I have said, my judgement is that the M was a truthful witness.

55. The most important factor in not ordering direct contact between the Applicants and A is the impact that such an order would have on the M. The M is A's primary carer. It is clear that she has no trust in the Applicants and is vehemently opposed to A spending time with them. She is trying to help A (aged 6) grapple with the fact that his father is in prison for a long time for "hurting someone" and how she will explain the offence to him. This must be a massive burden and be very challenging to any parent. I accept that she will find supporting contact once a month with the Applicants traumatic. It is also important that A is only 6 years old, and the Applicants are virtually strangers to him. Expecting in those circumstances that the M should send him off to overnight contact once per month is in my view unrealistic.

56. Her upset and unhappiness will undoubtedly then affect A. This is a factor Ms Ali simply has not considered. She has put A's "identity" way above the emotional impact on his primary carer, and the degree to which any 6 year old child gets their own emotional stability from that primary carer.

57. I did float the idea of less frequent direct contact, but no party showed any enthusiasm for that option. The Applicants and Ms Ali said it would be insufficient to establish a strong relationship, and the M was opposed to any direct contact.

58. Weighing all these factors up together, I take the view that the impact on the M and, through her, on A, clearly outweighs any benefits to A from contact. It is important to give A and the M the space to come to terms with visiting the F and the implications of his offending on A. The M also needs a break from litigation and the constant stress of having to, at least in her eyes, protect A.

59. It is not necessary in this case for me to make a s.91(14) order because grandparents have to gain permission to bring an application in any event. Ms Hibbert submits that a s.91(14) order would be a substantial interference in the grandparents' rights. The grandparents had not made multiple applications. She further submitted that the lack of notice of such an application should constrain the Court. However, I note that the Guardian did raise a s.91(14) as a possibility, and it is open to the court to make an order of its own volition. The hurdle of permission to bring an application does not remove rights, but it does protect a parent and the child from being caught up in almost endless litigation, as happens too often in private family law disputes. The strain on the M of having to deal with litigation concerning A for much of his life is intense, and it impacts on A's best interests. Although the grandparents have not themselves made more than one application, they have supported the F's frequent applications and enforcement applications, despite the fact at least one of them was plainly misconceived. In my view it is strongly in A's interests that there be no more court cases for at least three years. I will allow monthly indirect contact via letters, cards and presents to A. I hope that process will allow the Applicants to genuinely attempt to regain the M's trust, and that she will then feel able to support a future relationship between them and A.

60. I will therefore indicate that I think the M should be given a break of at least three years before she has to face any more applications.