Neutral Citation no. [2004] NICA 35 | *Ref:* **KERF5093**

Judgment: approved by the Court for handing down | *Delivered:* **30/09/04**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY J L-P

Before Kerr LCJ, Campbell LJ and Sheil LJ

KERR LCJ

Introduction

[1] This is an appeal from a decision of Weatherup J given on 16 March 2004 whereby he ordered that Mrs J L-P should have direct contact with her natural granddaughter (whom we shall refer to as S) following her adoption by Ms McA. The adoptive mother appeals against the order allowing direct contact on two principal grounds. Firstly, it is claimed that this decision offends the principle that contact should normally not be ordered unless the adoptive parents agree and Ms McA opposes direct contact. Secondly, it is suggested that the learned judge's conclusion was in direct conflict with the unanimous view expressed by all expert witnesses who gave evidence. It is contended that this evidence ought to have been accepted by the judge; alternatively, he was obliged to provide cogent reasons for rejecting it and he failed to do so.

Factual background

[2] S was born on 27 September 2000 in the Epsom area of Surrey. She was taken into care on 22 December 2000 after it was discovered that she had a number of unexplained injuries including rib and leg fractures. Her parents were charged with offences relating to the treatment of the child and convicted on 27 September 2001 after a trial in which they contested their guilt. They were sentenced to terms of imprisonment but released after fourteen months when their convictions were quashed by the Court of Appeal. S was placed in foster care. Subsequently, in September 2002 she went to live in Northern Ireland with Ms McA, a maternal great aunt by whom she was adopted in November 2003.

[3] Mrs J L-P has not seen S since August 2002. She was unhappy with the adoption and that unhappiness expressed itself in a number of ways. After a family group conference in which she had participated and during which she had agreed that Ms McA should be the nominated family member to be assessed as a potential adopter, she applied for a residence order in the English courts. The application was subsequently withdrawn. Subsequently she opposed the local authority's plan to place S with Ms McA. She threatened litigation and made comments during supervised contact with S that suggested that she did not accept the adoption plans. She has sent cards and letters to S that were deemed 'inappropriate'.

[4] Initially it had been decided that there should be open access to S for all family members. It was later decided that this could be unsettling for S and some refinement was introduced to the original plan. This involved Mrs L-P having direct contact twice a year. In fact this has not taken place because of what is said to be Ms McA's lack of trust for Mrs L-P and because social services considered that contact between the two would be 'disruptive' for S.

[5] On 9 October 2003 a meeting was held to discuss contact arrangements with Mrs L-P. This was attended by a surprisingly large number of social workers. According to the report of one of these, a Clare Puttock, it was concluded that direct contact for Mrs L-P was 'non-negotiable'. This court finds that expression a curious one to use in the context in which it appears. The question whether a grandparent should have direct contact with a grandchild must always largely depend on an evaluation of what lies in the best interests of the child. It should not be a matter for 'negotiation' except in so far as a process of negotiation can assist in achieving that aim and one would have thought that the circumstances in which such an eventuality might arise would be extremely rare. In any event, it was proposed that indirect contact between Mrs L-P and S continue and the local authority undertook to set up three psychotherapy sessions with Mrs L-P with a view to persuading her to accept S's placement with Ms McA. Mrs L-P attended one of these and was asked by the psychotherapist to return with her husband to a further session in January 2004. Subsequently Mrs L-P telephoned the psychotherapist and informed her that she did not consider that a session involving her husband was necessary. No further psychotherapy was undertaken at that time. The psychotherapist reported on 20 January 2004 that, "whilst Mrs L-P had demonstrated some positive indicators of moving on and being more accepting of the care plan for S, it was still early days in the assessment process and there was insufficient evidence … that Mrs L-P would sustain progress and therefore actively support S's adoptive placement".

The hearing before Weatherup J

[6] Reports were produced for the hearing of the application before Weatherup J from Ms Puttock, a Ms Marie McTaggart, who is the social worker with the South and East Belfast Trust who has had responsibility for S since her placement with Ms McA and the guardian ad litem, Ms Brenda Sheeran. All three reports referred extensively to the difficulties that Ms McA had in contemplating direct contact between S and Mrs L-P. It was indicated that the stress that Ms McA felt at the prospect was communicating itself to S and that this was having an adverse effect upon her. All three recommended that there should not be an order for contact at this point. All three gave evidence before Weatherup J and they once more gave as their opinion that there should not be direct contact until Ms McA felt able to accept this.

[7] Mrs L-P and Ms McA also gave evidence. Mrs L-P claimed that she had now fully accepted the fact of the adoption and that Ms McA was now S's legal mother. She acknowledged that her reaction to the adoption had in the past been inappropriate but assured the court that she would do nothing to undermine Ms McA's care of S. Ms McA said that she did not believe that Mrs L-P had dropped her opposition to adoption; that she remained angry with Mrs L-P because of "what she put S through"; and that she was not prepared to consider mediation with Mrs L-P.

The judge's findings

[8] The judge recorded that all parties had agreed that contact with grandparents was, in principle, good for the child. He recognised that what he described as "the breakdown" between Ms McA and Mrs L-P was so deep that Ms McA continued to doubt Mrs L-P's sincerity in claiming that that she was reconciled to the adoption and in acknowledging that her behaviour in the past had been inappropriate. He concluded that a period of time should elapse to allow Ms McA to "obtain a degree of reassurance" that Mrs L-P had indeed become reconciled to the adoption arrangements.

[9] The judge recognised (entirely correctly, in our view) that postponement of a decision, with all the uncertainty generated by the attendant delay, would create substantial problems. He concluded, therefore, that Mrs L-P should undertake further sessions with a psychotherapist and that a course of post adoption counselling (which had earlier been mooted by social services but abandoned because of Ms McA's opposition to it) should also take place. He ordered that direct contact should not be resumed until both these courses had been completed and that, in any event, this should not begin until six months had elapsed. The judge added a rider to his order in the following terms: -

> "It will … be a pre condition of direct contact that the applicant completes both the psychotherapy and the post adoption counselling to the satisfaction of the County Council."

Events since the judge's decision

[10] Mrs L-P has undertaken six hours of psychotherapy between 15 July and 25 August 2004. The psychotherapist and adoption counsellor who carried out this work, Joan Hall, found her to be calm and in the final stage of resolving the loss of S from her family circle. Ms Hall supported Mrs L-P's application for direct access to S, commenting that her visits should not be in any way harmful to S; on the contrary they should be beneficial both in the short and long term. Despite knowing of the report from the psychotherapist, Ms McA remains implacably opposed to direct contact.

[11] On 20 September 2004, (two days before the hearing of this appeal), one Shona McGarry, a senior social worker with Surrey County Council, wrote to the appellant's solicitors in the following terms: -

> "I am writing to advise you that following the last hearing, at the judge's request we have arranged for Mrs L-P to complete the psychotherapy course that was commenced with a new independent counsellor.
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> The next part of the judge's direction was for the post adoption service to be satisfied that sufficient progress had been made for direct contact to be considered.
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> Surrey's post adoption service takes the view from research that direct contact is only successful if both parties are in agreement and that it doesn't work if it is imposed on a party.
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> It is the view of the service that agreements are best made by mediation and it is hoped that when Ms McA feels more confident through an established regular post box agreement that she will be able to view direct contact in a more positive manner and agree to further exploration in the future but this needs to be at her discretion as the parent of S."

[12] In our judgment, the statement in this letter that the second part of the judge's direction was that the "service be satisfied that sufficient progress had been made for direct contact to be considered", is a misrepresentation both of what the judge in fact said and what he clearly intended. The interpretation placed by the service on the judge's words would give it (and Ms McA) an effective veto over the resumption of direct contact. It is clear that the judge did not have this in mind in making his observation that the psychotherapy course should be completed to the satisfaction of Surrey County Council. We are satisfied that he merely intended that the course be successfully undertaken by Mrs L-P. He did not intend to leave to social services the decision whether direct contact should take place. To interpret the direction as it has been by Ms McGarry would frustrate the clear aim of the judge's order. We are satisfied that the judge's direction did not represent what she has suggested it meant.

[13] The letter made no reference to the judge's view that Mrs L-P should also undertake the post adoption course, and, indeed, she does not appear to have engaged in such a course. For reasons that will appear, however, we do not consider that this is of particular importance.

Should direct contact be ordered where the adoptive parent objects?

[14] Mr Donaldson QC for the appellant submitted that a court should generally order direct contact only where the adoptive parent agrees to it. In advancing this argument he relied principally on the speech of Lord Ackner in *Re C* [1989] AC 1 at 17/18. In that case C was placed with the appellants with a view to adoption. She had a brother to whom she was very much attached. C's mother withheld her consent to her adoption on the ground that it might weaken this relationship. Lord Ackner said: -

> "It seems to me essential that, in order to safeguard and promote the welfare of the child throughout his childhood, the court should retain the maximum flexibility given to it by the Act and that unnecessary fetters should not be placed upon the exercise of the discretion entrusted to it by Parliament. The cases to which I have referred illustrate circumstances in which it was clearly in the best interests of the child to allow access to a member of the child's natural family. The cases rightly stress that in normal circumstances it is desirable that there should be a complete break, but that each case has to be considered on its own particular facts. No doubt the court will not, except in the most exceptional case, impose terms or conditions as to access to members of the child's

> natural family to which the adopting parents do not agree. To do so would be to create a potentially frictional situation which would be hardly likely to safeguard or promote the welfare of the child. Where no agreement is forthcoming the court will, with very rare exceptions, have to choose between making an adoption order without terms or conditions as to access, or to refuse to make such an order and seek to safeguard access through some other machinery, such as wardship. To do otherwise would be merely inviting future and almost immediate litigation."

[15] It is apparent from this passage that the then prevailing view was that there should be a complete break from the natural family on adoption. It was for this reason that Lord Ackner considered that an order requiring adoptive parents to allow, against their wishes, access to the adopted child by blood relatives should only exceptionally be made. Even then, however, it was recognised that such a rule required to be heavily qualified. It was subject to the overriding consideration of what was in the best interests of the child and the precept that each case had to be decided on its own particular facts.

[16] It is now recognised that contact with a natural grandparent is generally in the interests of the child. This calls for a radically different approach from that suggested by Lord Ackner. It appears to us that where such contact is likely to benefit the child, it should only exceptionally be denied, especially where the basis on which it is resisted is opposition from the adoptive parent. In such circumstances it seems to us that, generally, contact should only be refused when it can be shown that this is likely to harm the child.

[17] In the present case Ms McA claims that her apprehension at the prospect of direct contact between Mrs L-P and S and the stress that she feels are communicating themselves to S and that she is unhappy as a result. There is no convincing evidence, however, that such contact will be harmful to the child. On the contrary, but for Ms McA's fears, there is every reason to believe that contact between S and her grandmother will help the child. Ms McA has a duty in the interests of her child to conquer what we consider are unreasonable fears about Mrs L-P failing to acknowledge her status as the parent of S. She cannot be permitted to hold a veto over direct contact between Mrs L-P and S on the basis of events that are now well in the past.

The evidence of the experts

[18] The three experts who gave evidence were unanimous in their recommendation to the court that direct contact should not be commenced until Ms McA felt comfortable with it and all therefore proposed that it

should be deferred for the present. The judge decided not to accept the recommendation, although his order was clearly designed to meet the concerns that had been expressed. Mr Donaldson suggested that he was obliged to accept the advice that he had received absent any compelling case to the contrary and none such had been provided.

[19] The manner in which experts' evidence should be regarded and dealt with in cases involving disputes as to residence and contact was considered by the Court of Appeal in England in the case of *Re B* [1996] 1 FLR 667. In that case the child had sustained serious injuries which the judge found had been inflicted by her father. He also found that the mother was to be exonerated from having played any part in the causation of those injuries and had not failed to protect her daughter. He directed that there should be a phased return of the child to her mother's care and he rejected the local authority's application for a care order. The local authority, supported by the guardian ad litem, appealed, arguing that the judge erred in law in not acting on the unanimous opinions of the experts, the paediatric consultant, the guardian ad litem and the social worker, all of whom urged that the child be placed for adoption.

[20] The Court of Appeal rejected this argument. At pages 669/670, Ward LJ said: -

> "A similar submission, albeit in a wholly different context, met with a very sharp rebuff from Lord President Cooper who declared in *Davie v Magistrates of Edinburgh* 1953 SC 34, 40:
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> > '... the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert.'
>
> In a sense the position in children's cases is a fortiori because s 1 of the Children Act 1989 imposes a duty on the court to be satisfied as to, and to give paramount consideration to, the child's welfare, which emphasises the need for the court to exercise its independent judgment of the material facts. …
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> … The expert advises, but the judge decides. The judge decides on the evidence. If there is nothing before the court, no facts or no circumstances shown to the court which throw doubt on the expert evidence, then, if that is all with which the court is left, the court must accept it. There is,

> however, no rule that the judge suspends judicial belief simply because the evidence is given by an expert."

[21] We agree with the reasoning in this passage and would add that a distinction should be drawn between those cases where an expert reaches a conclusion within his expertise based on his analysis of relevant facts and the situation where the expert makes a recommendation based on his view of undisputed facts. In the *Re B* case the paediatrician had reached the firm conclusion that both parents were to blame for the injuries to the child and the judge acknowledged that she enjoyed wide experience in child paediatrics, in child assessment and in psychotherapy. He rejected her evidence, however, on the basis of countervailing testimony from the mother and health visitors. In the present case, unlike *Re B*, the judge did not have to confront the difficult task of deciding which party had the correct end of a hotly disputed evidential stick. Most of the material facts were agreed. What the judge had to do was decide whether to accept the course that had been recommended to him. It is clear that the recommendation had been based critically on Ms McA's feeling of unease about the authenticity of Mrs L-P's assurances that she accepted the adoption. The judge was obliged to make an assessment not only of the genuineness of the claims that Mrs L-P made but also the reasonableness of Ms McA's professed fears. That he was led to a different conclusion than the experts did not (as was required of the judge in *Re B*) involve a rejection of their analysis of the facts but merely a decision that differed from their proposal on the course to be taken.

[22] Since, as we have said, the judge was required to assess the validity of Mrs L-P's assertion that she had accepted the adoption and would not seek to undermine it and to evaluate what weight to place on Ms McA's avowed fears, it is inevitable that this court is less well placed than he to make a judgment on such matters. This is a balancing exercise that is *par excellence* for the judge who has seen and heard the witnesses. As the Court of Appeal said in *Re B* it is not for this court to interfere unless the judge was plainly wrong. As it happens we consider that the judge was unquestionably right and his judgment has been vindicated by the report of Ms Hall.

[23] We also reject the criticism made of the judge that he failed to explain why he had not accepted the evidence of the experts. Mr Donaldson suggested that the judgment in the present case contrasted sharply with that in *Re B* where the trial judge had given an elaborate explanation of his rejection of the paediatrician's evidence and for declining to follow the recommendation of the guardian ad litem. To some extent such contrast as exists reflects the difference in the nature of the issues that arise. As we have said, in *Re B* the judge had reached an entirely different view on a disputed issue of fact than did the consultant and this called for a more detailed explanation. Here the judge simply had to explain why he had elected for a

different course than that chosen by the experts. In our view he did so with admirable clarity in paragraphs [7] to [10] of his judgment.

Conclusions

[24] We have concluded that neither of the grounds of challenge to the judge's decision has been made out and that the appeal must be dismissed. Six months have now elapsed since the decision which was the period that the judge considered was required before direct contact could begin. In light of the report and recommendations of Ms Hall, we are satisfied that there should be no further delay in putting the arrangements in place for direct contact. In particular we do not consider that a post adoption course requires to be undertaken by Mrs L-P. To that extent the order of the learned judge will be varied.