



Childrens Court New South Wales

Medium Neutral Citation: Re Bethany [2012] NSWChC 4

Hearing Dates: 29 February, 2 & 5 March 2012

Decision Date: 12/03/2012

Jurisdiction: Care and protection

Before: Magistrate Graham Blewitt AM

Decision: Section 90 application by father dismissed; previous order of Campbelltown Children's Court rescinded; parental responsibility for residence of child allocated to carers; parental responsibility for education, training, religious upbringing and medication treatment of child shared; parental responsibility for contact between father and child allocated to carers; orders made for minimum contact.

Catchwords: CHILDREN - intention of department to place the child with the father - application by father for parental responsibility - application by foster carers for parental responsibility - strong attachment to carers - potential for child to suffer psychological harm if removed from carers - application to rescind orders - best interests of child - contact orders

Legislation Cited: Children and Young Persons (Care and Protection) Act 1998
United Nations Convention on the Rights of the Child

Cases Cited: Re K (a minor) reported at [1990] 3 All ER 794

Category: Principal judgment

Parties: The Department of Family and Community Services
Mr Mitchell Irvine (father)
Mr and Mrs Meeks (carers)
Bethany (the child)

Representation: Ms Renshaw for the applicant, carers
Mr Hosking as agent for Ms Stanford for the father
Mr Dawson for the Director-General
Ms Rutkowska for the child

File Number(s): 60/2011

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JUDGMENT

- 1 This case is somewhat unique and has been difficult to decide.
- 2 Many, if not all, factual matters are not in dispute.
- 3 The case involves a five and a half year old girl, Bethany, who was removed from her mother in 2008 and has been in a kinship foster placement since 5 May 2008, that is, since she was almost two years old. She will have been in that placement for four years this May.
- 4 The mother is currently not involved in Bethany's life and has not been a party to these proceedings.
- 5 Bethany has never lived with her father, Mitchell Irvine.
- 6 Mr Irvine had separated from the mother prior to Bethany's birth.

7 He has since remarried. He and his wife have a child P, who was born in July 2010.

8 He also has two children from a previous relationship, Q aged 8 and R aged 10, and they visit him for regular overnight contact.

9 Bethany's foster carers are Tim and Louise Meek, the child's maternal great uncle and aunt. Since Bethany came into their care, they have had a son, Drew, born in August 2009.

10 The child is thriving in that placement, which is child focused, provides her with security and the carers are well tuned to her needs.

11 Final orders were made at Campbelltown Children's Court on 11 September 2008, allocating parental responsibility to the Minister, until Bethany attains the age of 18 years.

12 Following final orders, Bethany remained placed with Mr and Mrs Meek.

13 Her father believed that he was not the biological father until paternity was confirmed in May 2009.

14 Prior to this, he had not seen the child and had nothing to do with her. He did not participate in the care proceedings before Campbelltown Children's Court.

15 Once paternity had been confirmed, when the child was approximately 3 years of age, the father sought to have contact with her.

16 Contact between the child and her father has been occurring since September 2009 and by December 2010 had increased to overnight contact.

17 About that time the father indicated to the Department that he wished to be assessed, with a view to having the child placed in his care.

18 That assessment was undertaken, and in February 2011 an assessment report was provided to the Department by Natalie Potter, psychologist, who had recommended that Bethany be placed with her father.

19 At a meeting on 8 March 2011, arranged by the Department and attended by the carers and the father, the carers were informed for the first time about the Department's decision to place the child with the father.

20 On 30 March 2011 the carers lodged a section 90 application, seeking to rescind the orders of 11 September 2008 and sought parental responsibility of Bethany. Leave was granted, by consent, on 20 April 2011.

21 On 10 June 2011 the Court ordered that the Children's Court Clinic undertake an assessment.

22 Prior to the report being prepared and prior to the Clinician's assessment, the father lodged a section 90 application on 23 June 2011, seeking parental responsibility of Bethany.

23 A report was subsequently submitted by the Clinician, Dr Anne Hollingworth, on 20 July 2011, recommending that the child remain with the carers.

24 Following receipt of the Clinician's report, the Department changed its earlier position and supported the recommendation of Dr Hollingworth that the child remain with the carers.

25 Leave was granted by the Court in respect of the father's application, by consent, on 9 September 2011.

26 The matter came on for hearing before this Court on 29 February, 2 March and 5 March this year.

27 Dr Hollingworth, Caseworker Kayleigh Price, and the carer Mr Tim Meek gave evidence on the first hearing day.

28 On the second hearing day, Mr Meek's evidence was completed and Ms Natalie Potter testified.

29 On the last hearing day, Mrs Meek and the father and his wife Rhonda Irvine testified.

30 At the completion of the evidence the parties' legal representatives made oral submissions, and the matter was adjourned to today for judgment.

31 The Department's position is that parental responsibility in respect of the child should remain with the Minister and that both section 90 applications should be dismissed.

32 Further, in the event that the Court determines that no parental responsibility should remain with the Minister, then parental responsibility should be shared between the father and the Meeks, although the Meeks should have sole responsibility for residency.

- 33 The Department opposes any sharing of responsibility with the Minister, including contact.
- 34 The carer's position is that they should be allocated all aspects of parental responsibility, however, they would be prepared to accept shared responsibility with the father, but not the Minister. The carers also seek a section 86 contact order.
- 35 The father's position is that he should be allocated all aspects of parental responsibility, following mediation with the Meeks and a short-term transition plan over 3 to 6 months. He would, however, also be prepared to accept shared responsibility with the Meeks. He also seeks a section 86 contact order.
- 36 The child's representative also supports shared parental responsibility between the father and the Meeks and the making of a section 86 contact order.
- 37 I have already mentioned that many if not all of the factual matters are not in dispute.
- 38 In particular it is not disputed that both the Meeks and the father can meet all of Bethany's needs and there are no risk of harm issues involved in the case.
- 39 Further, wherever Bethany is placed, the other party will enjoy Family Law Court style contact, that is to say, overnight unsupervised contact once a fortnight and half school holidays.
- 40 Further, there is no dispute that Bethany's contact with her father is positive and that she is developing a strong bond with him and his family.
- 41 Further, there is no dispute that Bethany has a strong attachment to the Meeks and they are providing excellent care and meeting all her needs.
- 42 It is also not disputed that if Bethany is removed from the care of the Meeks, she will suffer grief, confusion and disruption.
- 43 This is where the experts, Dr Hollingworth and Ms Potter, depart in their expert opinions.
- 44 Dr Hollingworth's position is that Bethany should not be removed from the care of the Meek's because of the strong attachment she has to them and the certain psychological harm she will suffer if she is removed.
- 45 Ms Potter acknowledges that Bethany will suffer distress and trauma if she is removed from the Meeks, however, in her view Ms Potter believes this harm would be short term and can be mediated with the assistance of the four adults in her life, and this short term harm is outweighed by the potential long term harm she may experience, in adolescence, if she is not restored to her father.
- 46 The carer's representative criticise the opinions of Ms Potter, particularly in relation to her unwillingness to accept the possibility of a failed restoration to the father and its consequences. Ms Renshaw also challenges the research upon which Ms Potter bases her opinion that Bethany could suffer mental health issues in the future if she is not restored to her father.
- 47 The father's representative likewise criticises the opinion of Dr Hollingworth, accusing her of being arrogant and prejudiced against the father, and urges the Court to disregard her evidence altogether.
- 48 The Court acknowledges that there are concerns about the evidence of both experts, and the Court does not blindly follow all of their opinions, but nevertheless they both agree on the position that Bethany will suffer some short term harm if she is removed from the Meeks.
- 49 I now turn to the provisions of section 90 of the *Care Act*, in particular the considerations outlined in sub-section 6 that the Court must take into account before making an order to rescind or vary a care order:
- (a) The age of the child: I have already stated that Bethany is just over five and a half years of age, having been born in July 2006. The child had a disrupted and traumatic life when in the mother's care and has settled well since being placed with the Meeks, where she feels safe and happy;
 - (b) The wishes of the child and the weight to be given to those wishes: Dr Hollingworth has indicated in her report, that through play therapy with Bethany, during the assessment process, she expressed a strong desire to remain with the foster carers. I accept that Bethany did express happiness being placed with the Meeks, however, given the context of the assessment, I do not place any weight in those wishes, having regard to the age of the child;
 - (c) The length of time the child has been in the care of the present caregivers: This in my view is a very important consideration in this particular case. Bethany has never lived with or been in the care of her father. She has been with the Meeks for almost four years, that is over two thirds of her life. This is a considerable period of time in the child's life;
 - (d) The strength of the child's attachments to the birth parents and the present caregivers: this is also an important

consideration in this particular case. I accept Dr Hollingworth's evidence that there is a strong attachment between the child and the present caregivers and this is her main attachment. I also accept that an attachment with the father is developing. I also accept the experts' opinions that it is possible that the child's attachment may be transferred to the father. I also accept Ms Rutkowska's submission that the child will maintain all attachments and relationships regardless of where she is placed;

- (e) The capacity of the birth parents to provide an adequate standard of care of the child: It is accepted by all parties that the father can provide an adequate standard of care and the Court has not had to consider the position of the mother, who has not been a party to these proceedings. Nor is there any doubt about the carer's ability to provide an adequate standard of care, and
- (f) The risk to the child of psychological harm if the present care arrangements are varied or rescinded: This in my opinion is a critical consideration in determining this case. All parties agree that it is highly likely that Bethany will suffer psychological harm if she is removed from the carers. Ms Potter's position is that such harm would only occur in the short term and could be overcome with proper interaction by the adults, that is by the Meeks and Irvines. Dr Hollingworth's position in this regard, is why take the risk of causing psychological harm to the child. In Dr Hollingworth's opinion, and that of the carers, Bethany will feel betrayed by the adults in her life if she is removed from the care of the Meeks and it is possible that she will not trust adults in the future. The carers are also concerned that if Bethany is removed from their care, she will feel as if she has done something wrong and she will lose self-esteem. Ms Potter weighs the risk of short-term harm to Bethany against the possible long-term harm if she is not restored to the father. In my view the risk of short term harm is certain. There is no certainty that Bethany will overcome this short-term harm. If Bethany remains with the Meeks there is no risk of any short-term harm. Equally, there is no certainty that Bethany will suffer long-term harm if she is not placed with her father. The risk of such long-term harm is reduced, in my view, if Bethany has the benefit of a high level of contact with her father, as seems to be a certainty in this case. Further, Bethany will be in a similar position as her half siblings Q and R who do not live with their father and who enjoy liberal contact with him. I agree with Mr Dawson's submission that removing Bethany from the care of the Meeks presents too many unknowns.

50 In addition to the statutory considerations stipulated in section 90, the Court has also considered the following matters:

- (i) Mr Hosking, for the father, in his submissions referred the Court to a decision of the English Court of Appeal in the case of *Re K (a minor) reported at* [1990] 3 All ER 794. I have had the benefit of reading that case and with respect I agree with the decision reached in that case. I agree with Mr Hosking that the case bears many factual similarities with this case, with one important exception. In the English case, the child had been in the care of the father for a period of time and restoration of the relationship between the father and his son was an important issue for the Court. In the present case, Bethany has never lived with the father;
- (ii) I have also considered the provisions of the United Nations Convention on the Rights of the Child, in particular Articles 8 and 9. In my view the Court is acting in compliance with the convention;
- (iii) It is highly likely that regardless of the outcome of these proceedings the Meeks and the Irvines will be able to work closely together to achieve outcomes which will be in the best interests of Bethany, although it appears important that they attend mediation when this case is finalised today;
- (iv) All parties are motivated by what they believe to be the best interests of the child, and are not motivated by personal considerations.
- (v) I am not prepared to make any orders in relation to the mother's contact with the child;
- (vi) I place no weight on the evidence relating to the father's position regarding Bethany referring to the Meeks as her Mum and Dad, and
- (vii) Similarly I remain neutral on the position adopted by the Meeks at the meeting on 8 March 2011.

51 Taking these matters into consideration, on balance, it is my view that Bethany should not be removed from the care of Mr and Mrs Meek.

52 I am also of the opinion, that the Minister has played a minimal role in Bethany's life since being placed with the Meek's, and I do not accept the Department's reasons, given in evidence, why the Minister should continue to have a role in her life, given the level of care provided by the Meek's.

53 There seems to be a general consensus amongst all the parties, that a shared parental responsibility arrangement between the carers and the father may be appropriate in this case. I agree with this position.

54 I also agree that it is appropriate to make a section 86 contact order providing for Family Law Court type contact between the child and her father, namely overnight weekend contact every second weekend and half school holidays. In this regard I accept the submissions from the parties and the evidence of Ms Potter, that there should be a gradual shift towards the full implementation of such contact. Further, if there are any signs of distress, such as Bethany demonstrating regression in development, or aggressive or defiant behaviour before, during or after contact, then the timing of the full implementation of this level of contact should be reviewed and delayed. It would be hoped that the parties can agree amongst themselves as to the commencement and concluding times and dates, both in relation to the weekend contacts and school holidays. In my view, the period of transition to fortnightly contact should gradually build to two nights contact during the first three months, that is, by mid June 2012. It is also my view that the transition

to half school holidays should also be gradual, commencing with one week during the July 2012 school holidays.

55 Accordingly, I make the following orders:

- (1) The father's section 90 Application is dismissed;
- (2) The orders of the Campbelltown Children's Court on 11 September 2008 are rescinded.
- (3) Pursuant to section 79(1)(a)(iii) of the *Care Act* parental responsibility for residence of the child Bethany is allocated to her maternal great uncle and aunt, Tim and Louise Meek, until the child attains the age of 18 years.
- (4) Pursuant to section 79(1)(a)(iii) parental responsibility for education and training of the child, the religious upbringing of the child and the medical treatment of the child is to be shared between the maternal great uncle and aunt, Tim and Louise Meek, and the father Mitchell Irvine, until the child attains the age of 18 years.
- (5) Pursuant to section 79(1)(a)(iii) parental responsibility for contact between the father and the child is allocated to her maternal great uncle and aunt, Tim and Louise Meek, until the child attains the age of 18 years.
- (6) Pursuant to section 86 the father is to have the following minimum unsupervised contact with Bethany, namely each alternate weekend gradually building to two nights contact by mid June 2012, and half school holidays, commencing with one week during the July 2012 school holidays.

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