

CONTACT IN LOCKDOWN: PRIVATE AND PUBLIC FAMILY LAW CONSIDERATIONS

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PUBLIC LAW

The law

Children Act 1989 s.34:

s.34(1): duty on LA to allow 'reasonable contact' between parents and children in care

s.34(2)-(3): power of court to make orders for contact on applications of parents, LA, child etc.

s.34(4): power of court to permit LA to refuse to allow contact with parents (with or without application)

s.34(6): power of LA to refuse contact if necessary to safeguard or promote child's welfare, urgent, and for no more than 7 days

Children Act 1989 Sch. 2, para 15:

15(1): duty on LA, unless it is not reasonably practicable or consistent with his welfare, to endeavour to promote contact between looked after child and parents

Government guidance:

*We expect that **contact between children in care and their birth relatives will continue**. It is essential for children and families to remain in touch at this difficult time, and for some children, the consequences of not seeing relatives would be traumatising.*

But:

Contact arrangements should therefore be assessed on a case by case basis taking into account a range of factors including the government's social distancing guidance and the needs of the child. **It may not be possible, or appropriate, for the usual face-to-face contact to happen at this time and keeping in touch will, for the most part, need to take place virtually.** We expect the spirit of any contact orders made in relation to children in care to be maintained and will look to social workers to determine how best to support those valuable family interactions based on the circumstances of each case.¹

The state of play?

From the recent Nuffield Foundation 'rapid review':

Contact is rarely taking place face-to-face when children are placed with foster carers [...] and the evidence suggests **very wide variation in local authority attitudes as to whether or not to allow contact and what form it should take.** This might range from very limited possibilities in some local authority areas to others where enormous efforts are being made by local authorities and social workers to ensure that children, including babies, can stay in touch with their families. All of this is reported to make care proceedings even more challenging.²

Implications of the law/guidance:

- The duty is to allow 'reasonable' — not necessarily 'direct' — contact;
- A cessation of direct contact — as long as the level of (indirect) contact allowed remains 'reasonable' — will not amount to a 'refusal of contact', and LA will not be obliged to apply under s.34(4);
- Local authorities unlikely to be criticised for suspending direct contact (as many/most have). Many older foster carers will fall into a vulnerable category. Even if not, how can supervision/transport be facilitated while keeping staff safe / ensuring social distancing?
- Parents entitled to apply under s.34(3) to reinstate direct contact — but consider carefully whether a court is likely to order an unwilling LA to supervise (and make its employees available to supervise) direct contact.

Maintaining direct contact in public law cases:

- Where the LA is not supervising contact — but simply facilitating/supervising handovers or conducting occasional visits for family arrangements — it may be reasonable to expect this to continue in some form. However, the views of the carers, who still have to be involved with contact, will be significant.

¹ Coronavirus (COVID-19): guidance for children's social care services (6.5.2020)
<https://www.gov.uk/government/publications/coronavirus-covid-19-guidance-for-childrens-social-care-services/coronavirus-covid-19-guidance-for-local-authorities-on-childrens-social-care>

² Nuffield Foundation: *Remote hearings in the family justice system: a rapid consultation*
<https://www.judiciary.uk/wp-content/uploads/2020/05/remote-hearings-rapid-review.pdf> (May 2020)

- Otherwise, consider whether a (privately-funded) Independent Social Worker can take on the role of the LA to the court's satisfaction.

Where direct contact is not (currently) possible:

- Ongoing indirect contact (including, but not limited to, phone/video contact) will often be vital. LAs likely to be expected to make reasonable — even creative — proposals. Aim should be to compensate, as far as possible, for the lack of face-to-face contact.
- Examples:
 - Regular phone and video calls (albeit inevitably for shorter duration than direct sessions).
 - Letters / cards / gifts (NB PHE do not consider this a contagion risk)³
 - Playing of voice recordings / pre-recorded videos (e.g. of stories, songs etc.) to children, showing photographs, to be provided by parents and facilitated by foster carers, at a set frequency.
 - Very frequent contact with very young children may be essential to encourage ongoing recognition and bonding.
- Urgent s.34(3) applications for orders for indirect contact of this sort — especially where direct contact has been suspended without any substitute — may be entirely appropriate.

After lockdown?

- LAs can be expected to keep matters under review as 'lockdown' eases. How and when direct contact resumes will vary between LAs, but there needs to be specific justification for any ongoing restrictions which are said to be due to Coronavirus.
- Will likely depend on:
 - Changing government guidance
 - LA policies (which are unlikely to be uniform)
 - Capacity of LA to incorporate social distancing within its supervised settings
 - Capacity/willingness of LA to be 'creative' with contact outside of usual settings
 - Any health vulnerabilities of child's current carer, other household members, and the child
 - Travel arrangements, including distance to be travelled and mode of transport
 - Compliance of parents in relation to expectations around social distancing or related safeguards

³ Royal Mail: 'Public Health England (PHE), the key health authority has advised that people handling letters and parcels are not at risk of contracting the coronavirus. The World Health Organisation (WHO) has also advised that coronaviruses do not survive long on objects, such as letters or packages.' <https://www.royalmail.com/d8/uk-services-faq>

PRIVATE LAW

The law:

Coronavirus Regulations

*'a reasonable excuse [for leaving home] includes the need [...] in relation to children who do not live in the same household as their parents, or one of their parents, **to continue existing arrangements for access to, and contact between, parents and children**, and for the purposes of this paragraph, "parent" includes a person who is not a parent of the child, but who has parental responsibility for, or who has care of, the child;*⁴

- The Regulations permit ongoing contact, but do not require or recommend it. Relying solely on this provision (on either side) will achieve little.
- The Regulations do not appear to allow for contact that is not 'existing':
 - Strictly speaking, this is a problem for parents who wish/need to agree new / increased contact e.g. due to essential work commitments / loss of childcare
 - A potential obstacle for a parent looking to increase or introduce direct contact arrangements (whether as part of a stepped progression or otherwise)

Status of existing orders:

- Children Act 1989 s.11J(3): '[...] the court may not make an enforcement order if it is satisfied that the person had a reasonable excuse for failing to comply with the provision'.
- The validity of an existing child arrangements order is unaffected, but there is obvious new scope for a 'reasonable excuse' for a failure to comply.

Guidance:

McFarlane P: *Guidance on Compliance with Family Court Child Arrangements Orders*.⁵

- As per the Regulations, children may move for purposes of contact; 'it does not, however, mean that [they] must'
- Requires a 'sensible assessment of the circumstances, including'
 - the child's present health,
 - the risk of infection,
 - and the presence of any recognised vulnerable individuals in one household or the other'.
- Expectation for alternative arrangements to be made, preferably video-based.

⁴ The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 para. 6(2)(j)

⁵ 24.3.2020 <https://www.judiciary.uk/announcements/coronavirus-crisis-guidance-on-compliance-with-family-court-child-arrangement-orders/>

See also: CAFCASS: *Co-parenting and child arrangements in a global pandemic – advice for families*:

*Unless there are justified medical/self-isolation issues – or some future nationally issued guidance or expectation associated with leaving the house in your area – **children should also maintain their usual routine of spending time with each of their parents.** If there is a Child Arrangements Order in place this should be complied with unless to do so would put your child, or others at risk. This will help your child to feel a sense of consistency, whilst also reassuring them that the parent they don't always live with is safe and healthy.*⁶

The role of the court:

- The scenario: contact has been unilaterally suspended by the resident parent, citing Coronavirus concerns. Consider realistically the prospects of the court ordering direct contact against an unwilling parent.
- Court will allow room for legitimate differences in perspective: 'Even if some parents think it is safe for contact to take place, it might be entirely reasonable for the other parent to be genuinely worried' (President's guidance).
- Address suspicions: 'it's just an excuse to stop/limit my contact...'. How will you demonstrate this? What evidence can realistically be obtained? Court may be slow to ascribe an ulterior motive (absent clear evidence) to what would otherwise be a legitimate concern.
- 'The court is likely to look to see whether each parent acted reasonably and sensibly in the light of the official advice and the Stay at Home Rules in place at that time, together with any specific evidence relating to the child or family' (President's guidance, above); consider this alongside any evidence of vulnerability within the households.
- A particularly difficult scenario: retention of child by non-resident parent who cites symptoms, hence the need for isolation. The resident parent is likely to be suspicious. Bear in mind that this arrangement should be time-limited to 7/14 days depending on whether it is the child or household member who has developed symptoms. Urgent court intervention may be required if this generates/increases a risk of harm (e.g. if contact is ordinarily short / supervised by a family member but has, due to retention, suddenly become overnight and for days on end). Absent urgency, you may not get to court within the 7-14 days.
- Consider court delays vs. the pace of changing circumstances: by the time a hearing is listed at which contested issues can be determined (if not urgent), circumstances and guidance likely to have changed, perhaps unrecognisably.

Factors to consider

- Whether applying to court or attempting to negotiate, consider the following:
- **The relevant guidance on those who are particularly vulnerable / should 'shield', and the rules on self-isolation periods if symptoms develop.** While it is

⁶ <https://www.cafcass.gov.uk/download/12285/> (20.3.2020)

important to be familiar with this, it does not give you a conclusive answer about whether and how contact should continue.

- **Mitigation of risk:** Identify any vulnerabilities and attempt to offer reassurance and address concerns. Can your client agree to self-isolate / limit contact with others to absolute minimum / work from home / stop working, especially in the 7 days before contact? Can you agree expectations during contact: e.g. handwashing before/after/during contact, number/nature of outings allowed, travel arrangements, use of public transport etc.?
- **The child's position:** children may already be emotionally affected by lockdown, consider the impact that changes to / continuation of contact will have both on them and their relationships with the parents.⁷ Their wishes and feelings may have elevated importance. Could you do more harm than good by continuing/suspending contact?
- **Quality of contact:** in cases where there has been a preceding period *without* contact, consider whether it is better (a) to introduce limited, indirect contact now (which may provide limited potential for relationship (re)building), or (b) wait until circumstances allow for the full range of direct contact options.
- **The future:** Can you agree a timescale for at what point in the loosening of restrictions contact should resume, or at least be reviewed, perhaps to coincide with government reviews.
- **ADR / non court-based processes** should be explored. Court delays due to understaffing coupled with relisting of adjourned hearings only likely to worsen.

Contact centres and supervision:

- NACCC statement⁸: recommends centres suspend direct contact but 'continue offering their invaluable services using technology where this is possible'
- Possible alternatives (contact local contact centre to ascertain provision)
 1. **Family alternatives:** centres may work with parents to identify others that might be able to take up the role of the contact centre.
 2. **Indirect contact** is being achieved using Skype, WhatsApp video calling, FaceTime etc. Some centres are finding ways to support this so that similar arrangements can be implemented in line with the services usually being offered. Third parties, such as 'Bold Moves', may also provide this service.
 3. **Handovers:** centres may be offering handover facility for parents who cannot organise this without the centre.

⁷ <https://www.gov.uk/government/publications/covid-19-guidance-on-supporting-children-and-young-peoples-mental-health-and-wellbeing/guidance-for-parents-and-carers-on-supporting-children-and-young-peoples-mental-health-and-wellbeing-during-the-coronavirus-covid-19-outbreak#how-children-and-young-people-of-different-ages-may-react>

⁸ <https://naccc.org.uk/coronavirus-update>

- Some **Independent Social Workers** may be willing to offer professional supervision of contact / support with handovers with appropriate social distancing in place.⁹

Alternatives to direct contact:

- Parents who have decided/agreed to suspend direct contact should ordinarily be encouraged/expected to explore 'indirect' options.
- Courts are more likely to be persuaded to make orders for ongoing phone/video contact, particularly where regular direct contact is suspended.
- Some more creative options?
 - 'Marco Polo': app allowing for exchanges of short videos, may be more beneficial than stilted/artificial conversations
 - Online gaming, often allows for live communication/'chat' between older children and friends / family members
 - Video/audio recordings of bedtime stories, songs etc.
 - 'Netflixparty.com' – facility that allows simultaneous streaming of programmes/films in different households (i.e. remote 'move nights')

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⁹ <https://www.basw.co.uk/independents-directory>