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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **11/12/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

Between:

A HEALTH AND SOCIAL CARE TRUST

Applicant

v

A MOTHER

Respondent

and

A FATHER

Respondent

In the matter of a female child aged 6 years 10 months

Ms S Ramsey KC and Ms P McKernan (instructed by the Directorate of Legal Services) for the Health and Social Care Trust
The mother appeared without representation
Mr A Magee KC with Ms M McHugh (instructed by Quigley Grant & Kyle Solicitors) for the Father
Ms M Smyth KC with Mr M McAleer (instructed by Caldwell & Robinson Solicitors) for the child by her Court Children's Guardian

McFARLAND J

Introduction

[1] The Trust has applied for a care order in respect of the child. There is a related non-molestation order brought by the father against the mother. I have anonymised this judgment to prevent the child and members of her wider family from being identified.

[2] Earlier proceedings had concluded with a supervision order made on 1 September 2021 together with residence order in favour of the father, a contact order in favour of the mother for supervised contact with the child, and a prohibited steps order prohibiting the mother from removing the child from Northern Ireland. There is a history in this case of the mother abducting the child and removing her across the border into the Republic of Ireland. During the earlier proceedings in Londonderry family care centre, based on the evidence of Dr Michael Curran consultant psychiatrist (report of 10 February 2021), the court had ruled that the mother lacked litigation capacity and had appointed the Official Solicitor as her guardian ad litem.

[3] In July 2022 the mother abducted the child again and she was returned following Hague Convention (1980) proceedings in Dublin. The Trust applied for a care order in August 2022 and the court has issued interim supervision orders.

[4] The mother unsuccessfully applied for a residence order or in the alternative a contact order requiring contact five days a week. This was refused by the court on 28 June 2023. The mother then abducted the child again necessitating a return order being issued by Mr Justice Fowler on 6 July 2023. The child was returned to Northern Ireland but there was further concern about publicity emanating from the mother identifying the child as being the subject of Children (NI) Order 1995 ("CO") proceedings.

[5] The care plan at this time was based on the father looking after the child, but work still required to be done with the father, particularly in relation to his misuse of drugs. Although a hearing date was fixed for four days commencing 30 January 2024, after the father tested positive for cocaine in a recent hair follicle test, care planning has been stalled. It is a difficult case with significant issues concerning the ability of either parent to care for the child, with the possibility of casting the caring net wider to consider kinship options or even a stranger placement.

[6] During this second set of proceedings the court did not make a formal ruling on litigation capacity, but had invited the Official Solicitor to assume a role, although the status would have been as *amicus*. However, given the continuing frustration on the part of the mother concerning her legal representation (John Fahy & Co solicitors, Ms M Connolly KC and Ms M Kelly of counsel) and the stated desire of the mother that she wished to terminate the retainer, a hearing on litigation capacity was convened at 12 noon on 8 December 2023.

Litigation capacity

[7] There is a presumption that all litigants do have capacity. Although the phrase 'borderline capacity' is often used it is not recognised in law. This is a simple binary decision. The report of Dr Curran is now of nearly three years vintage. The mother was refusing to be assessed by Dr Curran or indeed any other psychiatrist and she cannot be forced to undergo such an examination (see *Galo v Bombardier*

Aerospace [2023] NICA 50 at [74]).

[8] Although the opinions of the Official Solicitor and lawyers who have had engagement with the mother provide some insight, the test for litigation capacity is primarily based on the provisions of Article 3 of the Mental Health (NI) Order 1986 and the need to be satisfied that the mother suffers from a "mental disorder" which means a mental illness, a mental handicap or any other disorder or disability of mind. Although a personality disorder was excluded from this definition by Article 3(2), it can be included by virtue of a direction of the Lord Chief Justice made under section 75(2)(b) of the Judicature (NI) Act 1978 and dated 4 April 2019.

[9] In light of the insufficiency of evidence to rebut the presumption of the mother's capacity, I ruled that she did have litigation capacity, and therefore her decision to terminate the retainer of John Fahy & Co was valid. John Fahy & Co and the instructed counsel were then permitted to come off the record.

McKenzie Friend application

[10] The court reconvened at 2pm on 8 December 2023 to review the case generally, but before it did that, an application was made that Tracey Morris ("Ms Morris") be appointed the McKenzie Friend of the mother given her new status as a litigant in person. The term is derived from the case of *McKenzie v McKenzie* [1971] P 33 and the McKenzie Friend, if appointed, can provide moral support, take notes with the permission of the judge, help with case papers and quietly give advice during a hearing. In exceptional circumstances rights of audience (*ie* speaking rights) can be permitted by the court.

[11] Ms Morris was permitted to attend the court during this application, and was granted speaking rights to enable her to address the court concerning the application and to answer questions relating to her background.

[12] The written application in the approved form had been submitted on the morning of 8 December 2023 and the other legal representatives had only just received a copy. However, I decided to proceed with the application that day given the need to deal with the issue.

[13] The application stated that Ms Morris had been trained by a solicitor for a period of 11+ years, and when the office of that solicitor was closed in 2013, she had been acting as the "eyes and ears" of the solicitor since 2010 onwards due to the solicitor's loss of eyesight. She further stated that she had "advocated" for many families and had been accepted by Mr Justice Colton in several NIHE related judicial reviews. She had also "advocated a family case" in London in 2023 before Mrs Justice Theis and had "stood as an advocate" in Monaghan Family Centre courts. She said that she had never been refused permission to act as an "advocate/McKenzie Friend" in any court. She referred to having been granted advocacy rights by District Judge Magill and His Honour Judge Kinney. No corroborative evidence was produced concerning these assertions.

[14] Ms Morris was questioned by me about an email that she had sent direct to me (via the court office email address) on 4 December 2023. She said that the purpose was to alert me to the difficulty being experienced by the mother in "sacking" her legal team and getting the case papers. The email does make a reference to this, but it is wide ranging correspondence running to 76 lines. I will deal with this email in more detail below.

[15] The practice relating to the appointment and conduct of McKenzie Friends is set out in Practice Note 03/2012 (McKenzie Friends (Civil and Family Courts)) ("PN 03/12"). I have also considered the judgments of Wall LJ (*Re O'Connell* [2005] EWCA Civ 759), Master Redpath (*McA v McA* [2006] BNIL 63), McFarlane LJ (*Re F* [2013] EWCA Civ 726, HHJ Devlin (*Brennan v Doherty* [2018] NICh 27) and Mrs Justice McBride (*Ulster Bank v Pollock* [2021] NICh 23).

[16] The themes that emerge from the Practice Note and the judgments are as follows:

(a) There is a strong presumption in favour of permission for a McKenzie Friend to be appointed, and that permission should not be refused unless there is a good reason (*Re O'Connell* at [67]);

(b) PN 03/2012 gives illustrations of circumstances when a refusal may occur (para 6):

    (i) the assistance is being provided for an improper purpose;

    (ii) the assistance is unreasonable in nature or degree;

    (iii) the McKenzie Friend is subject to an order such as a civil proceedings order or a civil restraint order or has been declared to be a vexatious litigant; by a court in Northern Ireland or in another jurisdiction of the United Kingdom;

    (iv) the McKenzie Friend is using the case to promote his or her own cause or interests or those of some other person, group or organisation, and not the interests of the personal litigant;

    (v) the McKenzie Friend is directly or indirectly conducting the litigation;

    (vi) the court is not satisfied that the McKenzie Friend fully understands and will comply with the duty of confidentiality.

(c) It also gives factors which are not of themselves sufficient to justify refusal (at para 7):

    (i) The case or application is simple or straightforward, or is, for instance,

a directions or case management hearing;

(ii) The personal litigant appears capable of conducting the case without assistance;

(iii) The personal litigant is unrepresented through choice;

(iv) The other party is not represented;

(v) The proposed McKenzie Friend belongs to an organisation that promotes a particular cause;

(vi) The proceedings are confidential and the court papers contain sensitive information relating to a family's affairs.

(d) The negative role of the proposed McKenzie Friend in the conduct of the litigation up to the date of the application may be a factor (see *Ulster Bank*);

(e) The negative role of the McKenzie Friend in other proceedings, including proceedings outside the jurisdiction may be a factor (see *Brennan*);

(f) An anticipation by the proposed McKenzie Friend to give evidence or the giving of evidence by the McKenzie Friend may compromise the appointment (see *Re F* at [26] and [27]);

(g) Should there be a concern about the compliance with the rules relating to confidentiality or the inappropriate disclosure of documents the court may need to satisfy itself by enquiring if the proposed McKenzie Friend understands the role and may require assurances about the use of documents (see *Re O'Connell* at [128] and [135]).

[17] I now turn to deal with the email sent by Ms Morris on 4 December 2023. It was addressed to me and was sent to the court office. It was not copied to any of the other parties in the proceedings or to the solicitors then on record for the mother. It was copied to an email address of another person. At the hearing Ms Morris identified this person as Micky Randall who she said lived in Weymouth, England. This person has no interest in these proceedings and Ms Morris described her as another McKenzie Friend. The email refers to the child and the mother and father by their names. Ms Morris did not appear to appreciate that publishing material which is likely to identify a child as being involved in any proceedings under the CO is not permitted and is a criminal offence (see Art 170(2) and (9) of the CO).

[18] Although Ms Morris at the hearing stated that she wrote to me to bring to my attention the difficulty with the mother's current solicitor, the contents of the email extend well beyond that purpose. It not only included legal submissions but also purported to give evidence. One relevant sentence is "I have been watching this

case very closely since January 2023 when [the child] was forced back into the care of a dangerous Man/Father/Alcoholic/Junkie/Bully/Narcissistic Bitter Drug Abuser and Dealer." No other corroborative evidence relating to the description of the father is referred to, or provided, in the email. Later she refers to her involvement since early 2023 having spoken to the mother on many occasions and referring to herself as the mother's "Advocate."

[19] Ms Morris in the concluding section of her email indicated that she would be writing to "Justice Seamus Treacy on this Matter, and also Justice Colton." She then stated that she believed that "a more senior judge should have this case before him/her due to the evidence of biasy (*sic*) and the immediate danger that [the child] has been in …"

[20] The email also refers to the mother lodging a "sworn affidavit" in the morning.

[21] I have considered the written application from Ms Morris, her oral submissions and the content of the email.

[22] I have no hesitation in determining that the mother would benefit from a McKenzie Friend now that she has dispensed with the services of a solicitor and counsel and has disengaged from the Official Solicitor. McFarlane LJ in *Re F* at [18] stressed the relevance of the withdrawal of legal aid from significant areas of the family justice system in England as an important issue. This does not apply in this case as the mother will be entitled to legal aid, which is likely to include two counsel, should she wish to avail of it. However, this is a complex case and given the mother's current presentation she would clearly benefit from expert assistance and advice.

[23] The question is whether Ms Morris is an appropriate person to give that assistance and advice as a McKenzie Friend. I am prepared to accept her application at face value up to a point. However, despite her claim to have had 11+ years of training from a solicitor and working with that solicitor she does display a worrying lack of understanding of the basic practice and procedure of the family courts. She appeared to be unaware of the rules with regard to confidentiality with regard to identifying a child.

[24] She has filed a document which purports to give evidence. There is a lack of awareness with regard to the submission of evidence in documentary form, and particularly the requirement to serve all parties involved in the proceedings with the documents. As a person contributing evidence in a case, her role as a potential McKenzie Friend is highly questionable, particularly if it is the intention of the mother to call Ms Morris to give evidence.

[25] By sending the email directly to me without notice to the other parties, Ms Morris was attempting to influence me inappropriately in relation to this case. She has also indicated that she will also be writing to two other judges as she believes a "more senior judge" should deal with the case. This type of

correspondence is entirely inappropriate and displays not only a basic lack of understanding of practice and procedure in the courts but also a similar lack of understanding of core fundamental aspects of what a fair and transparent hearing before an impartial tribunal actually involves.

[26] Ms Morris has referred to her role as 'advocate' for the mother during 2023. This mother is in a most vulnerable position. Some of the mother's decision-making which resulted in the abduction of the child has been highly questionable and has not served any purpose in advancing the mother's case, or the child's welfare. It is obvious from the content of the email that Ms Morris appears to have supported the mother's conduct. If this is the type of advice that has been giving to date to the mother, one can understand why the mother acted as she did. There is certainly no evidence of Ms Morris acting to date in a positive manner in this case.

[27] Having heard Ms Morris I did not consider that she has given sufficient assurances to assuage my concerns about her future conduct.

Conclusion

[28] I therefore consider that although the mother would benefit from the services of a McKenzie Friend, Ms Morris is not a suitable person to act as a McKenzie Friend for the mother. Should the mother wish to adduce the evidence already set out by Ms Morris in her email, the mother should make the usual application for the leave of the court to do so. In the interim, the mother may benefit from receiving legal advice and she should consider instructing a solicitor. If she does not wish to do so, she may wish to approach another person to fulfil the role of McKenzie Friend. The court will consider any application on its merits.

[29] The court has already directed the Trust to file a report on the outstanding care planning issues by 23 January 2024 and it has fixed 30 January 2024 for a review hearing, the main purpose of which will be to timetable the case to final hearing.