

Neutral Citation No: [2023] NIFam 13

Ref: McF12273

*Judgment: approved by the court for handing down
(subject to editorial corrections)**

ICOS No: 17/120777

Delivered: 25/09/2023

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

A MOTHER

Appellant

-and-

A FATHER

Respondent

IN THE MATTER OF A FEMALE CHILD AGED 11 YEARS

The mother was a personal litigant
Ms Cregan (instructed by Brendan Kearney & Co Solicitors) for the Father

Transcript of the ex tempore judgment

McFARLAND J

Introduction

[1] This is an *ex tempore* judgment, but I will arrange for a transcript to be typed and made available to the parties over the next few days. This judgment has been anonymised to protect the identity of the child.

[2] On 27 April 2023 Her Honour Judge McCaffrey made a residence order in favour of the father until the child attains the age of 16 years and also made a contact order in favour of the mother with a rotating arrangement of Week 1 a three hour contact supervised by Social Services and Week 2 a two hour contact at a contact centre.

[3] At the time the mother was represented by a solicitor and counsel. The hearing on 27 April 2023 did not take up much court time as the orders were sought on a consent basis, with both parties agreeing.

[4] The mother lodged an appeal on 11 May 2023 on the following ground – “[The] court refused to provide fairness for a litigant in person and person with a disability as directed in Equal Treatment Bench Book. No evidence heard or presented. No adjournment or adjustments provided to detriment of case and child involved.”

[5] Prior to the hearing before me on 25 September 2023, the mother applied for a ‘McKenzie Friend’, and this was granted, although the mother indicated that the McKenzie Friend would not be assisting her during the hearing.

Appeals

[6] The law in respect of appeals from a family court is very well established and was recently re-affirmed by the Court of Appeal in *Re SB* [2023] NICA 48 in the following terms by Keegan LCJ at [33]:

“[33] The appellate test in family proceedings flows from the Supreme Court decisions of *Re B* [2013] UKSC 33 and *Re H-W* [2022] UKSC 17. It is simply whether the judge was wrong. The Supreme Court clarified the current law in *Re H-W*, paras [48]-[50]:

‘48. The very clear decision in *In Re B* ... does not alter the near-universal rule that appeals in England and Wales proceed by way of review rather than by way of re-hearing ...’”

The reference in *Re H-W* to ‘England and Wales’ also states the law in respect of Northern Ireland.

[7] Nourse LJ in his judgment in *Re F* [1992] 1FLR 561 held that a court could not entertain an appeal against a perfected and subsisting order by a party who was expressed to have consented to it. In that case an appeal was brought by a father against an interim order for custody, care and control (an order similar to the orders made in this case) made with the consent of the parties. The father, having previously consented, appealed. At 562CD, Nourse LJ stated:

“...[T]he appeal is misconceived. This court cannot entertain an appeal against a perfected and subsisting order by a party who is expressed to have consented to it. While the order stands, the party who seeks to appeal is estopped by record from saying that he did not give his consent

and thus from reopening the subject matter of the dispute.”

He then continued at 562E

“...[T]he father’s remedy is to commence a fresh proceeding to set the order aside.”

Consideration

[8] The merits of this appeal can be dealt with in brief form. The test is whether Her Honour Judge McCaffrey in making her orders was wrong. When the case was heard by the judge on 27 April 2023 both parties were represented by counsel. The judge was informed by both counsel that the case had been settled by the parents, and each counsel confirmed that their client consented to the orders. This was a private law dispute and therefore a judge is entitled to place confidence in any agreement made by the two people who exercise parental responsibility for a child as to the arrangements for that child. Although the court has an overall discretionary role when making orders which are presented as consent orders, when both parties are represented by counsel, a judge should be very slow to interfere with an agreement reached by parents in a private law dispute as to the future of their child.

[9] The actual question for me to answer is - was the judge wrong in making orders which she was told were agreed orders and by consent? Nothing the mother has said or written could lead this court to answer that in the positive. In fact, as Nourse LJ in *Re F* has indicated, the mother is estopped from bringing this appeal, and any attempt to revoke or vary the existing order should be by way of a fresh application. I understand the mother has already made such an application to Londonderry Family Proceedings Court, although it, on its own motion, has transferred the case to this court.

[10] That should be sufficient to deal with the appeal, but as the mother is a litigant in person, I will now deal, briefly, with the actual points raised by the mother in her notice of appeal:

- a) **The court refused to provide fairness for a litigant in person and person with a disability as directed in Equal Treatment Bench Book.** The mother was not a litigant in person. She was represented by a solicitor and by counsel on 27 April 2023. There is no evidence to suggest that any disability of the mother was not catered for in the context of the hearing on 27 April 2023. The case was settled. She did not give evidence. I understand she was present in court when the agreement was announced and was able to hear the proceedings. (I accept the submission of Ms Cregan that the mother was physically in the courtroom at the time, despite the mother’s denial of that fact.) A court, when required, should make certain adjustments to its

procedures to facilitate the participation of a disabled person. However, in this case, the mother was represented by solicitor and counsel and as the case was settled, a contested hearing was not required. In the circumstances the situation as presented to the Court of Appeal in *Galo v Bombardier Aerospace UK* [2016] NICA 25 did not apply, and that case gives little assistance.

- b) **No evidence heard or presented.** Neither party presented any evidence, which was their choice. The mother could have given evidence and call other evidence, but she declined to do so.
- c) **No adjournment or adjustments provided to detriment of case and child involved.** No adjournment was requested by, or on behalf of, the mother at the hearing on 27 April 2023. Adjustments to take into account any disability of the mother were not requested on 27 April 2023, nor were any required given the outcome of the hearing.

[11] In fairness to the mother, as she is now a litigant in person, I have considered the file generally and the documents she has filed to complement her notice of appeal. There is nothing contained therein that would in any way assist the mother in respect of this appeal.

Decision

[12] This appeal has no merit whatsoever and is therefore dismissed. I will not order the mother to pay the costs of this appeal despite its hopeless nature. The father is in receipt of a legal aid certificate, and I will direct taxation of his costs in the usual way.

Transfer

[13] Both parties have indicated that the case should now be dealt with in the High Court. The father submits that this is because of its complexities with regard to the mother's presentation and the mother submits that she feels that it is only in the High Court that she is getting a proper hearing of her case. Having considered the overall case, I do not consider that this is a case that should be dealt with in this tier. It is a relatively straightforward dispute and well within the jurisdiction of either the Family Proceedings Court or the Family Care Centre. It is only currently before this court due to what was a misconceived appeal from the mother. The case should not have been transferred in the first place, and I now transfer it back to the Family Proceedings Court.