

Neutral Citation No. [2013] NIFam 1

Ref: MAG8714

Judgment: approved by the Court for handing down

Delivered: 24/01/2013

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION (OFFICE OF CARE AND PROTECTION)

IN THE MATTER OF THE CHILDREN (NORTHERN IRELAND) ORDER 1995

BETWEEN:

A TRUST

Applicant;

-and-

**E
S**

Respondents

MAGUIRE J

[1] This decision relates to the issue of whether a full fact-finding hearing should be held in relation to threshold issues arising in this case (as the applicant Trust contends) or whether the court can proceed to the welfare stage of the proceedings on the basis of concessions as to the threshold stage made by E (the mother) and by S (the father).

[2] The essential background can be stated shortly. The court has before it an application by the Trust in respect of C under Article 50 of the Children (Northern Ireland) Order 1995. C is female and is currently aged 14. The Trust's application is for a care order. The application is dated 1 June 2012.

[3] It appears that C is the child of a mother and father who are not married. C has four half siblings, three sisters and one brother, within the family unit. The half brother is T now aged 23. The reasons underpinning the application for a care order

are set out in the application itself. It is clear that as long ago as November 2004 the Trust had concerns about this family. These arose from allegations that the father had been the perpetrator of sexual abuse *vis a vis* his daughter L and his son S, both children of his by a different relationship. There was also an allegation that C's half brother, T, had inappropriately touched her. At that time C was medically examined by Dr Amanda Burns, a Deputy Forensic Medical Officer and by Dr Sandi Hutton, a Community Paediatrician. The findings in respect of C were abnormal and indicative of chronic penetrative sexual abuse.

[4] As a result of the above, the father left the family home and C's name was placed on the Trust's Child Protection Register under the category "Confirmed Sexual Abuse".

[5] According to the Trust's application, thereafter C did receive some therapeutic services from the NSPCC. In the course of receiving these C at one point indicated that "there were some secrets, important ones, which she couldn't talk about".

[6] In the period from 2004, it was the Trust's understanding, in part from what it had been told by the mother, that the father no longer resided at the family home. Consequent to this understanding, the Trust removed C's name from its Child Protection Register on 29 June 2007. Later, on 4 March 2008 the Trust closed C's case in the belief that the risk to C had been reduced with the father no longer living at home and having little, or no, contact with C. The mother was believed by the Trust to have a moderate to high ability to protect C.

[7] The case of C was, however, re-opened by the Trust in April 2012. This came about following confirmation that the father was again residing in the family home with the mother and, *inter alia*, C. It is recorded that the father at this time refused to leave the home and the Trust say that neither parent was prepared to engage with a child protection plan aimed to protect C.

[8] At or about the same time the father was arrested by police in relation to historic allegations of sexual abuse not involving C but involving L and S, his daughter and son by a previous relationship.

[9] In the absence of co-operation from the mother on 30 May 2012 an Emergency Protection Order was granted by the family proceedings court in respect of C.

[10] This was followed up by the Trust's care application.

[11] In the meantime the father was charged with a range of sexual offences including offences against L and S aforesaid. He was remanded in custody.

[12] In the Trust's threshold summary it states as follows:

“The reason for this application is that the Trust is extremely concerned that [the mother] will not protect [C] or may inhibit the support which [C] requires at this time. It is the Trust’s view that [C] requires a safe, stable and secure environment external [from] family until immediate assessments of all family members are undertaken. The concern centres on the historical and inter-generational alleged sexual abuse that has occurred and the secrecy apparent within this family unit. It is the Trust’s view that should this order [viz the Article 50 Care Order] not being made, [C] could be subjected to immediate physical and emotional abuse.”

[13] While the above centres on the historical and inter-generational alleged sexual abuse, which might be thought to refer back to the allegations historically directed principally at the father, in a further section of the application there is a reference to what are described as “precipitating events”. Under this head there is reference to T, C’s older half brother. It is recorded that he had recently been charged with and had pleaded guilty to sexual assault on a 15 year old female. The Trust then refer to T babysitting C and to the mother’s attitude to T’s offending. It is recorded that the mother did not believe that T had committed the offence with which he had been charged. Rather, in her view, T only pleaded guilty on the advice of his solicitor, to avoid a custodial sentence.

[14] When the Trust’s application came to court an Interim Care Order was made and this has continued in force since, being renewed periodically.

[15] While initially C was placed with foster carers the situation has moved on. She is now being looked after by an elder half sister, K, who is a teacher, and her partner. C has contact with her mother. The father remains in custody awaiting trial in relation to the offences mentioned above. A measure of supervised contact between the father and C currently exists.

The proposed concessions

[16] As noted above the father and mother have indicated that each is prepared to make certain concessions with the object of avoiding the need for a full fact finding hearing on the threshold issues.

[17] The father’s proposed concessions may be summarised as follows. He is prepared to agree that at the date of the Trust’s intervention, 1 June 2012, C “was at risk of significant harm”. This was by reason of a number of factors. Firstly “on dates unknown prior to December 2004 whilst in the care of the respondents (*viz* the father and mother) the child was subjected to inappropriate sexual behaviour (which included penetration) by unidentified persons”. Secondly, following police and

Social Services involvement, the father agreed to leave the home with the mother then supervising all contact between C and the father. Thirdly, on a date unknown in 2010 the father and mother resumed cohabitation but neither informed the Trust of this as each should have done. Fourthly, the father refused to leave the family home when requested to do so by the Trust. Fifthly, in the circumstances described, the father had failed to protect the child.

[18] The mother's proposed concessions, again in summary form, are as follows. Firstly, she acknowledges that on dates unknown prior to December 2004 C, while in her parents' care, was subjected to inappropriate sexual abuse (which included penetration) by unidentified adult persons. Secondly, after the father had left the home she agreed to supervise all contact between C and her father. Thirdly, on a date unknown the father and mother resumed cohabitation without informing the Trust of this even though they knew they should have done so. Fourthly, the mother accepts that after T's conviction aforesaid in April 2002 she did represent to the Trust that she did not believe that T was guilty of the offence he had admitted. Fifthly, she now accepts (though she did not do so at the time of the Trust's intervention on 1 June 2012) that the father had sexually abused his daughter (L) and son (S) both of a previous relationship. Sixthly, she admits that both she and her husband have prioritised their relationship over the needs and welfare of C and that each had failed to protect C.

[19] In the light of these proposed concessions the Trust put before the court what is described as its "position paper". In this it has set out a document containing "Proposed Threshold Criteria". This document asserts that at the date of the Trust's intervention C was at risk of significant harm by reason of eleven enumerated matters. These include the following (in summary form):

- On days unknown prior to December 2004 while in the care of the father and mother C was subjected to inappropriate sexual behaviour (which included penetration) by unidentified adult person(s)
- Thereafter the mother, the father having left the home, agreed to supervise all contact between C and her father
- Later on a date unknown the father and mother resumed cohabitation but without informing the Trust as they ought to have done
- In or about 2010 T who was living in the same house as C indecently assaulted a female under the age of 15, which offence was admitted by him at court in April 2012
- Notwithstanding the last point, the mother represented to the Trust that she did not believe that T was guilty of the offence
- The mother, moreover, did not accept that the father or T presented a risk to C as a result of their inappropriate sexual behaviour
- The father when requested to do so by the Trust refused to leave the family home
- The father had sexually abused L and S (a daughter and son by a previous relationship)

- The father and mother have prioritised their relationship over the needs and welfare of C
- The father and mother had failed to protect C.

[20] The Trust position is that it requires all the matters it refers to to be conceded or proved at a fact finding threshold hearing. The Trust’s principal focus appears to be the position of the father. At paragraph 4 of its position paper the Trust asserts that:

“The concessions made by the father do not go far enough to recognise and establish the reason and concerns for Trust intervention. They fall short of what is required.”

[21] It is clear that the Trust wishes to have exposed (by concession or court finding) the facts of any alleged abuse by the father of L and S – the half-siblings of C.

[22] The Trust states that while they are suspicious that the father may have been involved in the abuse of C, this “cannot be proved at this time” (position paper paragraph 5).

The legal context

[23] This has helpfully been addressed in a position paper prepared by Mr Long QC and Grainne Murphy BL on behalf of the father. There was no dissent from any other party in the case as to the accuracy of the statement of legal principles which are recorded in that paper as applicable to the present situation.

[24] One of the authorities referred to in the father’s position paper – A County Council v DP and others [2005] 2 FLR 1031 at paragraph [24] McFarland J provides a helpful summary:

“The authorities make it plain that, amongst other factors, the following are likely to be relevant and need to be borne in mind before deciding whether or not to conduct a particular fact finding exercise:

- (a) The interests of the child (which are relevant but not paramount);
- (b) The time that the investigation will take;
- (c) The likely cost to public funds;
- (d) The evidential result;
- (e) The necessity or otherwise of the investigation;

- (f) The relevance of the potential result of the investigation to the future care plans for the child;
- (g) The impact of any fact finding process upon the other parties;
- (h) The prospects of a fair trial on the issue;
- (i) The justice of the case”.

[25] The court also draws attention to the following dictum of Butler-Sloss LJ in Re M (Threshold Criteria) [1999] 2 FLR 728 at 734:

“It is clear as a general proposition that there should be no unnecessary litigation in the courts and it is as important in family cases as in other civil litigation. But in cases such as the present where parents have offered a compromise in care proceedings it has to be on the individual facts of each particular case whether that concession offered by the parents is sufficient to meet the justice of the case and the best interests of the children. In some cases the concession which provides a basis for finding the threshold criteria proved will be adequate and it will not be necessary to go further and litigate the exact details of the abuse or other unsuitable or inadequate care of the children concerned”.

[26] In oral argument Mr Long QC described the court’s consideration of an issue of this nature – whether to accept threshold concessions so as to avoid a full fact finding hearing – as one of the court assessing and seeking to find the right balance. In the court’s view, this seems to be a correct approach and no party before the court has dissented from this formulation.

[27] The issue therefore for this court, taking account of the various factors mentioned above, is to apply the principles so as to achieve what is to be regarded as the right balance in this case.

The criminal proceedings against the father

[28] As is clear from the foregoing the father currently is in custody awaiting trial on a range of charges – 19 in all. The charges are of a sexual nature and cover a lengthy period of time and relate to various alleged victims. They involve allegations of abuse of L and S. The allegations in respect of each, but particularly in respect of L, are of an extremely serious character. It seems highly likely to the court that the issue in the criminal proceedings, at least as regards the two above alleged victims, will be materially similar to the issue which the Trust is anxious to have determined at a threshold fact finding hearing, albeit that there is of course a

difference between the standard of proof as between the different forms of proceedings. For the father, Mr Long QC, has made clear that he does not argue that the determination of issues of this sort in these civil proceedings should have to await the outcome of the criminal process. His argument, as already noted, is that in view of the proposed concessions the court need not determine through a fact finding process the truth or otherwise of the allegations made against the father in respect of L or S.

Care planning

[29] While the resolution of issues of care planning belong to the second welfare stage in a case of this type, it is clearly relevant for the court in making a decision on the issue which is now before it to take into account (as the principles above indicate) the relevance of the resolution of particular threshold issues to the process of care planning.

[30] As noted earlier, C is currently residing in a kinship placement with her half sister - K - and her partner, at her mother's former place of residence. Currently this placement appears to be working well.

[32] In connection with the welfare stage of the proceedings - assuming that stage is reached - the parties to the proceedings have different views as to the way forward.

[33] The mother is anxious for her to resume a role as principal carer in respect of C and ultimately she seeks that C should reside with her.

[34] The father's position, in contrast, is that he accepts that there is no prospect of him being a carer of C in the circumstances which have arisen. However he hopes to continue to have contact with C, albeit he accepts that this will have to be on a supervised basis.

[35] The Trust's position appears to be that it expects to provide care for C for the foreseeable future. Care may be provided by a placement with foster carers or a placement with her birth family. In the latter case the placement might be with her sister and her partner or with her mother. In the Trust's view the father's role is unlikely to be more than that of a parent who might enjoy supervised contact.

[36] In respect of the position of the mother the key issues in the context of the decision-making process will be likely to be concerned with the extent to which she was able to appreciate the risks which C faced or may in the future face and her actions in the past in respect of protecting C from risks and her ability prospectively to act to protect C in the light of whatever risk exists, if any.

The court's evaluation

[37] In seeking to arrive at a balanced position in this case the court has carefully considered all of the foregoing.

[38] While the court accepts that it is probably correct to say that the proposed concessions which have been offered by the father and mother in this case would suffice for the purpose of establishing threshold, so enabling the court to move onto the second (welfare) stage, it is conscious that in at least two very important areas there will – if the court proceeds as invited to by the parents – be an absence of fact finding. These areas are:

- (a) In relation to the allegations made against the father by L and S.
- (b) In relation to whether the father has in the past abused C.

[39] In his list of proposed concessions it is notable that the father makes no concessions on either of these matters. At the time when threshold fell to be judged, equally the mother was not prepared, it appears, to see the father's position in a negative light – albeit that the court is aware and acknowledges that she appears now to be convinced of his guilt in respect of the matters alleged by L and S.

[40] The court considers that the allegations made by L and S against the father which have given rise to the criminal charges the father currently faces are of the gravest character and, if proved, would be likely to have a major impact on other issues in these proceedings, including welfare stage issues. This is because if it is true that the father grossly abused L and S when both were young children, as alleged in the charges he faces, this in itself would be likely to affect issues of his contact with young children, whether C or any other young child. But it seems to the court the significance of such a finding would be unlikely to end there. If the allegations that the father currently faces are true the question of whether the father was the abuser of C would, in the court's judgment, inevitably arise. At the moment there is evidence to support the view that C was subjected to inappropriate sexual behaviour, including penetration, prior to 2004, but there is an absence of evidence, it appears, to support a finding of who was responsible for that. There is also evidence that C is holding a secret in this regard which may be relevant to the identity of the abuser. It seems to the court that if there was a finding that the father abused L/S this would be likely to have a significant impact on the issue of whether or not it was the father who abused C and would be likely also to inform the court's approach more generally. On the other hand, if there was a finding that the father was not guilty of the allegations made against him, this would be likely to open the way to a reconsideration of the extent of his potential role in respect of C or, for that matter, his contact with other children. Of course, the court does not seek to decide what exact impact there might be in such events now, but it does seem to the court that the evidence would have to be considered in the light of whatever findings were made whether for or against the father. While this would have implications

for the father's future role in respect of C and any other children who he might have contact with, it would also, in the court's view, have at least the potential to cause the court to look very carefully at the position of the mother who seems, at least until recently, to have reposed faith and trust substantially in the father, notwithstanding what she may have known about all of these matters - which is unknown to the court at this time.

[41] How all of this might play out is not entirely clear at the present time but there would be a purpose of importance in seeking to resolve these issues which perfectly conceivably might have a significant impact on the welfare issues in respect of C's future.

[42] The court therefore does not accept the argument that no real purpose would be advanced by fact finding in the areas the court has identified or that such further enquiry would be academic or unnecessary.

[43] On the other hand, the court accepts that it should act proportionately. It has been told that to enquire into the allegations against the father may take up considerable court time and may involve considerable expense, which in one form or another will be met out of public funds. Such further enquiry may also delay the consideration of the welfare stage, assuming that stage is reached. But, be that as it may, the court has to balance that against the importance in this case of establishing the key facts which in the court's view include establishing the veracity or otherwise of the central allegations against the father by L and S together with the potentially related issue of whether C was abused by him and the facts relating to the stance and approach of the mother at the relevant times.

[44] The interests of C are probably best served by the pursuit and uncovering of the truth but the court accepts that a countervailing factor will likely be that the process itself may be painful for her, as it could also be for others.

[45] The court having assessed the pros and cons of accepting the threshold concessions proposed by the father and mother has concluded that, taken together, they fail to meet the needs of a just resolution of the dispute. The court concludes that the better course is for it to hold, as proposed by the Trust, a fact finding threshold hearing which seeks to answer the questions of whether the father abused L and/or S or indeed C and what role or stance the mother adopted in the circumstances as they presented themselves to her. This is where, in the court's view, the right balance is to be struck in this case.

[46] Lest it might be thought otherwise the court wishes to make it clear that it has not overlooked the question of the difficulty there may be in the way of the court, having heard what evidence may be presented to it, arriving at a definitive conclusion on the civil standard of proof in respect of the matters identified. There can be no guarantee that the court will be able to reach a definite conclusion but the

court is of the view that this alone should not be a reason for it seeking not to test whether it can do so.

[47] For the record the court records that during the argument on this issue the guardian ad litem expressly adopted a neutral stance.

[48] I will hear the parties on the question of what consequential directions are needed in the light of this ruling.