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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

Re: C (NO CONTACT ORDER: REPRESENTATION OF CHILDREN)

GILLEN J

This matter arises out of an appeal to the High Court from a decision made by the Family Care Centre at Belfast on 18th December 2001 when it was ordered that the applicant P should not have any contact with the child C and that the child should not be informed of the identity of her natural father the applicant. The respondent is S the mother of the child.

The grounds of appeal as set out in the notice of appeal by the appellant are as follows:

1. The learned judge, in the exercise of his discretion, did not take into account factors which should have been taken into account in reaching his decision.
2. The learned judge, in the exercise of his discretion, took into account factors which should not have been taken into account in reaching his decision.
3. The learned judge in making his decision failed to have any or adequate regard or take proper account of the welfare checklist.

4. The learned judge in making his decision failed to have any or adequate regard or to take proper account of the best interest of the child.

The subject of this case is C who was born on the 3rd December 1997. C is a little girl with potentially severe congenital malformations including micogastria (small stomach capacity) and absent limbs. She had a very difficult time during the first year of her life requiring multiple hospital admissions. Her mother and her mother's extended family have provided her total care since the age of one and much of her improvement is, according to Doctor Stewart, Consultant Paediatrician, attributable to their dedication and care. The appellant, the father of the child, and the respondent, the mother of the child, are unmarried and it would appear that the relationship terminated towards the end of 1998. The judge found as a matter of fact the following [sic]:

> "Father has played no part in the recent life of the child partly because of criminal behaviour and a prison sentence; but prior to that there had been a breakdown of the parents relationship brought about by a level of violence and drink problem he has had for a long time. Depression and instability have been a feature. Unfortunately and up to now the father has had a great deal of trouble in leading his life in a way that does not produce a great deal of instability. I do not believe he gave an accurate account of even his current drinking habits; two to three litres of cider even recently. Unless sobriety is confirmed by outside agencies it is very difficult to act just on his say so. In consequence he cannot gave assurances or guarantees about his future conduct. Any sort of conduct would require self-restraint and sensitivity on his part. I do not believe he can provide this at present. I am not saying that the past governs the future but unless he were able to demonstrate a clear record of several years of abstinence, it would be impossible to see how he could be allowed into direct contact with this very disabled child. He has

> exercised quite a high level of violence on the mother on a number of occasions".
>
> This was not admitted by him but was serious enough for her to a get non-molestation order and contact RUC.
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> …
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> S was very young, her association with the appellant not approved by parents – she must have been infatuated. Bitter experience led to this split-up – his behaviour reached an intolerable level especially with the added burden she had of caring for a very vulnerable child receiving 24 hour a day care. People interested in child's welfare must conduct themselves accordingly. He did not."

As a result of these conclusions of fact, the judge then came to his decision and his note records as follows:-

> "Reject application for direct or indirect contact. Publication in papers shows complete lack of appreciation of the sensitivity required and shows no judgment whatsoever."

I was informed that the judge had before him one inappropriate publication in a local newspaper by the appellant advertising the date of birth of the child and his connection with her. The judge's note continues:

> "In the normal way a normal child at school and socialising should in general know the truth about paternity and one would start with that assumption. However – in this case – I do not think it would be in the child's best interest to be told at this stage … although they have had no contact order made."

I have quoted in extenso the judgment in this case which in effect was a document prepared by the solicitor for the appellant who had made notes of an oral judgment given on the 18th December 2001 by the Family Care Centre Judge. That document had been amended by the judge and he had concluded: "I approve the

foregoing as a fair and accurate summary of the reasons which I gave for my decision". Under rule 4.21 of the Family Proceedings Rules (Northern Ireland) 1996, the court is obliged to issue a written judgment and I am satisfied that in this particular instance this constitutes the written judgment required.

As this court has already decided in McG v McC appeals from Care Centres to the High Court will be governed generally by the principles set out in G v G (1985) 2 AER at 225. Accordingly I must be satisfied that either the judge has erred as a matter of law (ie he has applied the wrong principle) or that he relied upon evidence that he should have ignored or ignored evidence that he should have taken into account or that the decision was so plainly wrong that the only legitimate conclusion is that the judge has erred in exercise of his discretion.

At the commencement of this case I drew the attention of Mr Long QC, who appeared on behalf of the appellant, and Ms Dinsmore QC who appeared on behalf of the respondent, to the question of whether or not the child should be separately represented in this case and whether there was any need for evidence to be called on behalf of the child. In Re H (Contact Order) (No 2) 2001 FLR 22 at page 36 Wall J said:

> "Nonetheless, it does seem to me, as a matter of principle, that where the court is faced with contact issues as difficult as those which arise in this case, consideration should be given to the children being separately represented and, where appropriate, expert evidence being sought of their behalf. In such cases children quite frequently have particular interests and points which do not coincide with and are not necessarily capable of being adequately represented by their parents. Absence of separate representations in the present case means, in my judgment, that the court cannot give the children all the assistance they need."

Representation of children in private law cases is a vexed question that often arises. In Re A (Contact: Separate Representation) (2001) FLR 715 the President of the Family Division considered at para 22 of that judgment that, as a result of the incorporation of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, there may be an increased use of guardians in private law cases in England and Wales, to ensure that a child's perspective is fully explored in the litigation. It seems to me that separate representation should be considered in cases where there are allegations of abuse and other problems relating to the abilities of both parents which need to be properly investigated or where parents are unable to stand back and consider the child's perspective (as in Re H (Replacement of Guardian ad Litem) (2001) 1 FLR 664). However in this instance counsel properly indicated that it was not appropriate that the child be separately represented. I dismissed the idea because it became clear to me that, in forensic terms, the time for this had probably passed and the proceedings, one way or the other, needed to be brought to a close at this time. However it is a consideration that should be looked at in other cases.

In considering this appeal I have borne in mind the following principles:

1. The court naturally starts with a view that in most cases contact between the child and the non-resident parent is desirable both for the child and the parent. This accords with:

   (a) the general welfare of the child under Article 1 of the Children Order (Northern Ireland) 1995 ("the 1995 Order");

(b) Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 which confers the right to respect for private and family life, potentially to be enjoyed by all family members. The Convention Rights must be considered in private law proceedings under the Children Order by virtue of section 3 of the Human Rights Act 1998. The so-called "horizontal effect" has been expressly acknowledged in this context by the Court of Appeal in Payne v Payne (2001) 1 FLR 1052;

(c) Article 3 of the UN Convention on the Rights of the Child.

2. Where there is a conflict between the rights and interests of the child and those of a parent, the interests of the child must prevail under Article 8(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (see Re L and others (2000) 2 FLR at 334). In Sahin v Germany, Sommerfield v Germany, Hoffmann v Germany (2002) 1 FLR at 119, the European Court of Human Rights held that under Article 8 consideration of what lies in the best interests of the child is of crucial importance in every case of this kind. A fair balance has to be struck between the interests of each parent and those of the child. In doing so particular importance must be attached to the best interests of the child, which, depending on the nature and seriousness, may override those of the parent. In particular a parent cannot be entitled to such measures to be taken as would harm their child's health and development.

3. Family Judges and Magistrates need to have a heightened awareness of the existence of and consequences (some long term) on children of exposure to domestic violence between their parents or other partners. In Contact or other Section 8 applications, where allegations of domestic violence are made which might have an effect on the outcome, those allegations must be adjudicated upon and found proved or not proved. As a matter of principle domestic violence of itself cannot constitute a bar to contact. It is one factor in the difficult and delicate balancing exercise of discretion. In this context the ability of the offending parent to recognise his past conduct, to be aware of the need to change and to make genuine efforts to do so will likely be an important consideration. (See Re L (supra) at page 242).

4. The fostering of a relationship between the child and the non-resident parent has always been and remains of great importance. It has been intended to be for the benefit of the child rather than of the parent. In Re M (Contact: Welfare Test) (1995) 1 FLR 274 Wilson J said at 278-279:

> "I personally find it helpful to cast the principles into the framework of the checklist of considerations set out in Section 1(3) of the Children Act 1989 and to ask whether the fundamental emotional need of every child to have an enduring relationship with both his parents (s1(3)(b)) is outweighed by the depth of harm which, in the light, inter alia, of his wishes and feelings, this child would be at risk of suffering (S 1(3)(e) by virtue of a contact order."

I find that a helpful summary of the proper approach to contact applications such as this. There is no doubt that in cases in which, for whatever reason, direct contact cannot for the time being be ordered, it is ordinarily highly desirable that

there should be indirect contact so that the child grows up knowing of the love and interest of the absent parent with whom, in due course, direct contact should be established. (See Re O (Contact: Imposition of Conditions) (1995) 2 FLR 124 at 130(b). Similarly in this context, there is much to be said for what Hallman J said in A v L (Contact) (1998) 1 FLR 361 at 366d:

> "It is precisely because J is still young and has no understanding about the facts of life that it is more appropriate and better to introduce, very gently, and in age appropriate ways, at this stage, to the fact that he in fact has two fathers … he needs to know now, whilst he is sufficiently young that it is in no way threatening to him, that there is another father so that, in due course, as he begins to learn the biological facts of life, he can gently assimilate this truth about his parentage. To say and do nothing now is in truth storing up a potential bombshell for the future, which might be very damaging for J to learn and might indeed seriously undermine his sense of trust in his mother and D who are otherwise parenting him so well."

I derive from these authorities the principle that it is only where there are cogent reasons relating to the welfare of the child that both indirect and direct contact should be refused or that the truth about her parentage should be denied.

I am conscious that in this case the application for contact under Article 8 of the 1995 Order is governed by Article 3(1) of the 1995 Order namely that the child's welfare shall be the court's paramount consideration and that the welfare checklist set out in Article 3(3) of the 1995 Order must be applied. In the course of his judgment the judge did not expressly refer to this or to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. However I am

mindful of the views expressed by Lord Hoffman in Pigloska v Pigloski (1999) 2 FLR 763 at page 784(f) when he said:

> "The exigencies of daily courtroom life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true in an unreserved judgment such as the judge gave in this case but also of a reserve judgment based upon notes such as was given by the district judge. These reasons should be read on the assumption that, unless he has demonstrated to the contrary, the judge knew how he should perform his functions and which matters he should take into account. This was particularly true when the matters in question are so well known as those specified in Section 25(2). An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

I also share the views expressed by Wall J in Re H (Contact Order) 2002 1 FLR 22 at page 37 when he said:

> "Finally it will be apparent that I have made no mention of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 in this judgment. Inevitably, however, every order made under Section 8 of the Children Order 1989 represents in some measure an interference by a public authority (the court) in the right to respect for family life contended in Article 8. The court's interference must, of course, be in accordance with the powers given to that court under the Children Act 1989 and be proportionate. Every application involves a court balancing the rights of the participants to the application (including the children who are the subject of it) and arriving at a result which is in the interest of those children …… and proportionate to the legitimate aim being pursued. However it seems to me that a proper application of the checklist in Section 1(3) of the Children Act 1989 is equivalent to the balancing exercise required in the application of Article 8, which is then a useful cross-check to ensure that the order proposed is in accordance with the law, necessary for the

> protection of the rights and freedom of others and proportionate."

MY CONCLUSIONS

I have concluded that this extremely experienced Family Care Centre Judge has, within the ambit of his discretion, properly come to a conclusion that contact, both direct and indirect, should not be permitted. I do not believe he has made any mistake of law, he has not acted in disregard of any legal principle or under any misapprehension of fact and he has not taken into account irrelevant matters or omitted from account matters which ought to have been considered. In my opinion he has not been plainly wrong and has not acted outside the appropriate exercise of his discretion. I am satisfied that this judge did have in mind the welfare checklist and the paramountcy of the welfare of the child. As I have already said in Re S M (Interim Care Orders: Exercise of Judge's discretion) unreported 2nd May 2002 at page 7,

> "I do not believe there is any need to slavishly repeat in each instance that the welfare checklist has been applied so long as the gravamen of that exercise is clear from the judgment."

This judge has gone into some detail with the clear issues that were objectionable in this man's behaviour including his excessive drinking and his violent propensity, he has referred to the child's grave disabilities and the need for a high level of care to allow her to thrive, and he has referred on a number of occasions to the need to secure the child's welfare. All of this persuades me that he quite clearly had in mind Article 3 of the 1995 Order. Moreover he has referred in general terms to the basic principles that I have already set out. Mr Long QC who appeared on behalf of the

appellant, submitted that in particular he should have given consideration to the harm likely to be caused to the child by the suppression of the truth about her parentage and of course to the need to consider indirect contact once he had decided to refuse direct contact. At the bottom of the first page of the judgment, the judge's note records:

> "Reject application for direct or indirect contact. Publication of paper shows complete lack of appreciation of the sensitivity required and shows no judgment whatsoever. In the normal way a normal child at school and socialising should in general know the truth about paternity and one would start with that assumption. However – in this case – I do not think it would be in the child's best interest to be told the truth at this stage".

I think this extract from his judgment clearly indicates that he had turned from direct contact and was now refusing indirect contact because the publication in the paper illustrated to him a cogent and convincing reason why this child could not be exposed at this time to indirect contact. I believe the judge properly concluded that the publication in the newspaper heralded a real danger of this man abusing the facility of indirect contact at this time. Moreover, unlike me, he had the benefit of seeing and hearing the appellant deal with this issue of the publication and the motivation behind it. I can well understand the judge coming to the conclusion that even indirect contact could be used as a vehicle by this man to act contrary to the welfare of this child. Similarly, the judge came to the conclusion, not unreasonably in my opinion, that the cumulative effect of his behaviour rendered it unsuitable in the child's best interest to be told the truth <u>at this stage</u>.

2. It was argued that the judge made no express finding of potential harm to the child if contact were to be allowed. I do not share that criticism. The judgment clearly highlights the particular vulnerability of this child and the reckless misconduct of the appellant. His inability to exercise self-restraint obviously provided cogent excuse for the judge to conclude that neither direct or indirect contact could be tolerated in the child's best interests at this stage. I have therefore concluded that there was ample evidence on the judge's findings to conclude that this was one of those exceptional cases where there was sufficiently cogent evidence to justify refusing even indirect contact. He was obviously a man who could well avail of the opportunity of indirect contact even through a third party to strike at the stability of the child's present family set up and thereby occasion damage to her welfare.

3. I am satisfied that the judge did balance the rights of the child, the child's mother who has care for C and who has now established a new life with a new partner, and the rights of the appellant and has arrived at a result which is in the interests of the child and its proportionate to the legitimate aim being pursued. Having properly applied the checklist at Article 3(3) this is the equivalent of the balancing exercise required in the application of Article 8 of the European Convention for the Protection of Human Rights and in these circumstances I am satisfied that the appellant's Article 8 rights have been appropriately addressed.

This judge approached the case with the greatest care and sensitivity and I believe he has come to a cautious decision with the welfare of the child uppermost in his mind. It was a difficult and delicate exercise and I believe it would be entirely

inappropriate for this court to interfere with the exercise of that discretion. The more difficult the decision being made, the more difficult it is for an appellate court to interfere with the exercise of discretion vested in the judge. (See Re L (supra) at page 349(b)).

I pause only to observe that contact is not a fixed notion. Contact arrangements can change as parents and childrens circumstances change and they enter different stages of life. This judge emphasised, and I emphasise, that indirect contact at least is being denied only at this stage. The general principle that contact with a non-resident parent is in the interest of the child still holds good provided over a relevant period of time this appellant was able to objectively demonstrate by words and deeds that he was a fit person to exercise contact and could show a track record of proper and seemly behaviour. Assertions, without evidence to back it up, may well not be sufficient. It is up to him now to demonstrate over a requisite time that he can exercise appropriate self-restraint, judgment and sensitivity. Should he do that, then in the fullness of time this issue may be revisited.

Accordingly I dismiss the appeal.

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

Re: C (NO CONTACT ORDER: REPRESENTATION OF CHILDREN)

J U D G M E N T

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GILLEN J
