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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

Re SB (a child)

WEATHERUP J

The applicant is Craigavon and Banbridge Community Health and Social Services Trust ("the Trust"). The respondents will be referred to as "Mr B" and "Mrs B". The child will be referred to as "SB" and his deceased twin brother will be referred to as "DB".

This is an application by the Trust under Article 50 of the Children (Northern Ireland) Order 1995 for a care order for SB who was born on 28 August 1999 in Romania. The respondents, Mr and Mrs B, adopted SB and DB under the Order of a Tribunal in Romania dated 20 June 2000 but the foreign adoption was not recognised in Northern Ireland. The children were in the care of Mr and Mrs B as private foster carers and the Children (Private Arrangements for Fostering) Regulations (Northern Ireland) 1996 applied. The respondents oppose the Trust's application.

On 19 July 2000 Mr and Mrs B arrived back in Northern Ireland with the two children having completed the adoption process in Romania. Having previously been approved by the Trust for foreign adoption Mr and Mrs B visited the Trust's Family Placement Service on 10 August 2000 to give notice to the Trust of the children being in their care. On 23 October 2000, in the early hours of the morning, DB was brought to Craigavon Area Hospital by Mr and Mrs B. He was dead on arrival and there was a diagnosis of meningitis. On 5 November 2000 SB

was brought to Craigavon Area Hospital by Mr and Mrs B and was described as being unresponsive and floppy and was found to have a fractured skull. Mr and Mrs B could give no explanation as to how this had occurred. The skeletal survey showed an old injury to the clavicle. A strategy meeting was arranged by the Trust for 9 November 2000 and Mr and Mrs B were informed of the meeting. On the morning of the meeting Mr B told the hospital social worker that he had struck SB with a clenched fist on the 5 November 2000, causing the injury to the skull. Mr and Mrs B accepted the need for SB to be placed in foster care under Article 21 of the Children (Northern Ireland) Order 1995. Mrs B stated that she only became aware of her husband's injury of the child when he informed her on the evening of 8 November 2000. The police decided that they would now look more closely at the death of DB. On 10 November 2000 SB was discharged from hospital and placed in foster care.

On 15 November 2000 Mr B was arrested and later released on bail. Mr B admitted hitting SB, as he had admitted earlier at the hospital. Mrs B said that she only knew about Mr B being responsible for the injuries to SB when she was told by her husband on 8 November 2000. On 22 November 2000 the Trust held a Looked After Children Review and this confirmed the decision for placement with foster carers and required a comprehensive assessment of the position of SB. Contact between SB and Mr and Mrs B was to occur three times per week and was to be supervised by social workers or foster carers. On 30 November 2000 DB's body was exhumed as directed by the coroner. On 8 December 2000 the staff in the Trust decided that care proceedings should be initiated and on 15 January 2001 an Interim Care Order was granted. The comprehensive assessment was carried out and this was presented to a Review Child Protection Case Conference on 14 March 2001. The case conference acknowledged that by being in foster care, with supervised contact, SB no longer needed to be put on the Trust's Child Protection Register. However it was considered that the return of SB to Mr and Mrs B was not appropriate and his permanent needs were to be addressed at the next Looked After Children

Review, which was to take place on 21 March 2001. The social workers agreed that the comprehensive assessment was complete and recommended that SB should not return to Mr and Mrs B and that a concurrent permanency plan was required.

On 30 May 2001 permissive contact between SB and Mr and Mrs B was agreed and incorporated in an Order. This provided for supervised contact with Mr and Mrs B twice per week to the end of June and thereafter once per week to the date of trial. On 19 June 2001 the permanency meeting took place at which time rehabilitation of the child with Mr and Mrs B was ruled out. Under the proposed care plan, which was completed on 20 December 2001, the Trust propose a full care order in respect of SB and that contact with Mr and Mrs B should cease upon the grant of a full care order, the purpose of which would be to secure an alternative permanent adoptive arrangement for the child. The plan is subject to one farewell meeting with Mr and Mrs B and there will be also be reducing contact with the present foster carers. Mr B has pleaded guilty to causing grievous bodily harm to SB and his sentence has been deferred until March 2002.

It is necessary to consider the available medical evidence. SB was taken to the Craigavon Area Hospital on 5 November 2000 and was seen by Dr Thompson who asked Mr and Mrs B whether SB had sustained any injury within the previous twenty four to forty eight hours and they stated that they were not aware of any such injury occurring. SB was found to have a soft swelling extending approximately 4-5 cms in diameter over the right parietal bone. There were small areas of purple bruising around his right eye and a small amount of dried blood in his left nostril. An x-ray of his skull revealed a linear fracture. Twenty-four hours after admission a skeletal survey was carried and this revealed a fracture of the left clavicle. Dr Thompson expressed the opinion that the skull fracture was as a result of a significant injury to the right side of his head, which probably had been sustained within twenty-four hours before admission. It was not possible to comment on the age of the fractured clavicle.

Dr Patterson, a consultant paediatric radiologist at the Royal Belfast Hospital for Sick Children, examined the x-ray films of SB taken at Craigavon Area Hospital on the 6 November 2000. She found that the lateral skull film showed an acute linear parietal bone fracture. There was also a fracture at the junctions of the middle and lateral third of the left clavicle. She concluded that the clavicle fracture would have been sustained between three months and nine months prior to x-ray. Accordingly the fracture to the clavicle would have occurred outside the care period that SB was with Mr and Mrs B.

In relation to the skull fracture, Mr and Mrs B had denied any knowledge of the matter to Dr Thompson on 5 November 2000, at the time of admission to hospital. They further denied any knowledge of the matter on 6 and 8 November 2000, in response to enquiries from Mary Dooher, a social worker engaged at Craigavon Area Hospital with responsibility for the paediatrics department. However, on 9 November 2000 when Mr and Mrs B saw Miss Dooher in advance of the meeting which was due to take place, Miss Dooher recorded the conversation as follows:-

> "Mr B said that he wanted us to know that he had caused the injury to SB the day of SB's admission. He said that his wife was upstairs at the time, he had brought SB downstairs, set him on the chair and went into the kitchen to get Calpol as SB had been irritable and crying because he was teething. He returned to SB who was still on the chair, but SB resisted his efforts to give him the Calpol by trying to get away from him and pushing the medication away. Mr B said that he was frustrated by this and the next thing he knew he had hit SB on the head with his fist.
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> He told me that the previous evening of 8 November 2000 he went for a drive alone and thought and prayed about what to do and he knew that he would have to tell his wife and tell me what had happened. They were both very upset with Mrs B supporting her husband and that they loved the boys and would never want to harm them. I asked Mr B was there any cause for concern about DB's death, he told me no, he did not harm DB in any way and the blow given to SB was the only such incident"

DB had been admitted to Craigavon Area Hospital on 23 October 2000. The cause of death was stated in the report of the autopsy to be "undetermined". Dr Patterson reported on the x-rays of DB taken at the time of admission. There are seven findings to be considered. First, fractures of the posterior aspect of the right third to eighth and left fourth to eighth ribs, found to be three to four weeks old. Second, fractures of the right ninth and tenth and the left eighth and ninth ribs posteriorly, found to be two to three months old. Third, fractures of the right seventh and eighth and the left seventh ribs, found to be two to three weeks old. Fourth, a fracture of the left sixth rib was found to be two to three months old. Fifth, fractures of the anterior ends of the right fourth to sixth and left fourth and fifth ribs, found to be three to four weeks old. Sixth, fractures of the medial end of the left clavicle and the anterior portion of left third rib, found to be two weeks old. Seventh, fracture of the left distal metaphysis found to be four to six weeks old.

Dr Patterson expressed the view that the injuries seen on the x-rays were caused by trauma and the types of injuries seen were highly specific for non-accidental injury. There is no explanation for these injuries. There were two other occasional carers who had roles in relation to the two children but according to Mr and Mrs B they could not have been responsible for the injuries. These injuries were sustained during the period of care of DB by Mr and Mrs B.

Article 50 of the 1995 Order lays down threshold criteria for care orders. Article 50(2) provides:

> "A court may only make a care or a supervision order if it is satisfied-
> (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
> that the harm or the likelihood of harm, is attributable to -
> (i) the care likely to be given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
> ii) the child's being beyond parental control."

In considering what is "likely" Lord Nicholls stated in Re *H and R (1996)* 1FLR 80 at 95D-

> " 'Likely' is being used in the sense of a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case."

The likelihood of harm must be "attributable" to the likely care if no order is made. In Re *B and W (1999)* 2FLR 833 at 842B it was stated that the "attributable" condition "does not necessarily import any degree of individual responsibility or culpability." The likelihood of harm must be attributable to the lack of care rather than the degree of responsibility of the carer.

I find in this case that without doubt the injury occasioned to SB's skull was caused by Mr B, and he has admitted responsibility. In relation to the injuries to DB, I am satisfied that they were non-accidental and I am satisfied that they occurred during the care of Mr and Mrs B. It has not been established who was responsible for those injuries. There is no basis for considering that a cause of those injuries exists outside the care of Mr and Mrs B. I consider them to represent significant, multiple, repeated, unexplained injuries to DB. In all the circumstances I am satisfied that the threshold criteria have been satisfied in relation to SB, both by reason of the injuries sustained by SB and also by reason of the injuries sustained by DB.

I consider that I am entitled to rely on the circumstances of the injuries to DB in assessing the risk to SB. I have been referred to Re *CB and JB (1998)* 2FLR 211 where one child had been non-accidentally injured by one or both parents while in joint care and this was relevant to the position of a sibling in the parent's joint care at the same time, but who had not suffered injury. In Re *B and W (1999)* 2FLR 883 a child had suffered injury during a period when she was being cared for by a child-minder during the day and by her parents at other times. The cases illustrate that where the court cannot establish the identity of the person responsible for the

injuries to the child, but does establish that the injury happened during periods for which parents are responsible, the threshold criteria may be satisfied. To hold otherwise would strike at the whole philosophy of child protection under the statutory scheme. I am satisfied in this case that the threshold criteria have been met.

Next I turn to consider whether to make an order, and what type of order to make. Article 31 of the 1995 Order provides that it is the welfare of the child that is paramount. Article 33 provides that a court shall have regard in particular to a number of matters that have been described as a statutory welfare checklist. The Trust carried out a Looked After Children Review on 21 March 2001 and that Review listed five concerns. First, Mrs B demonstrated no anger or surprise at her husband's actions in hitting SB and in delaying telling his wife. Secondly, Mr and Mrs B believed that the incident was a one off and would never occur again with no indication as to how this would be achieved. Thirdly, Mr and Mrs B's apparent conviction that SB would return to their care and there should be no other outcome for him. Fourthly, the situation Mr B was dealing with when he hit SB was not extreme. Fifthly, no explanation had been given as to how DB sustained multiple injuries.

The Trust decided to proceed with a parent permanency plan for SB while continuing to give Mr and Mrs B opportunities to address the concerns. In addressing the concerns it was suggested by the social worker at a meeting with the respondents on 10 April 2001 that Mr and Mrs B might obtain independent guidance and they responded that they would consider the matter with their advisors. On 11 May 2001 Mrs B filed a statement of evidence in these proceedings in which she stated that she would undertake any further work that was requested but there was no direct response to the Trust on the particular issue of securing independent help and assistance. As to the parent permanency planning there was a meeting on 19 June 2001 which noted that there had then been no progress on the issue of independent assistance for Mr and Mrs B and it concluded that in those circumstances that aspect should not be pursued further.

In addition the permanency meeting determined that adoption other than by Mr and Mrs B was the way forward. The Looked After Children Review took place again on 3 July 2001 and at that time it was noted that the proposal of the permanency meeting for adoption other than by Mr and Mrs B had been before the Adoption Panel and had been approved. This course was then agreed by the Looked After Children Meeting so a firm decision was taken by the Trust that Mr and Mrs B should not have a future care role.

I share the concerns that are outlined in the reports of the social workers. Mr and Mrs B did not give evidence in these proceedings but through their counsel and through the reports of their discussions with the social workers and the welfare workers, reference has been made to a number of matters which should be taken into account. One is the suggestion that Mr B's conduct towards SB occurred in the context of his reaction to the death DB a short time before and that such circumstances will not recur. I do not accept that the likelihood of harm is diminished for this reason. Further, there had been prior approval of Mr and Mrs B by the Trust when they were assessed for foreign adoption and I accept that. Further, reference was made to the picture of contentment within the family, as far as outsiders were concerned, and indeed this appears in the video that they made of the children, and I accept that as well. In addition there was the absence of cause for concern in relation to the children when they were examined on a number of occasions by the doctors, by the health visitors and by the social workers and I accept that as well. Then reference is made to the co-operation that Mr and Mrs B gave to the authorities, and while I do not believe their co-operation was total, I do accept that their co-operation was considerable. However, while I have taken account of the matters outlined above, I am not satisfied that they are sufficient to address all of the concerns that have been raised.

The care plan is a matter of considerable importance because it allows the court to determine how the matter is to develop and the courts have certainly emphasised the importance that must be attached to the care plan. This care plan indicates that the Trust is seeking a full

care order in respect of SB so that it can progress its aim of seeking an alternative adoptive placement. Various couples have been identified and they have not been given specific information in respect of SB beyond his age and his need for permanency but the Trust seeks to have SB placed within three to six months if a full care order were to be made. In addition, it is the Trust's proposal that there be no contact between SB and Mr and Mrs B. The Guardian ad litem's report indicates that he shares the views of the Trust. The report addresses the statutory welfare checklist and it sets out considerations under each of the headings. The report notes that SB has clearly formed attachments to his current foster parents with whom he has been present for some fourteen months and the Guardian states that it is important to note that the current carers have provided the longest duration and consistency of care to SB. Understandably, SB would consider his present foster carers to be his primary attachments. The Guardian's report concludes that the granting of a full care order would be in SB's best interests. Further the report concludes that contact between Mr and Mrs B should cease if a full care order is granted and SB is placed for adoption.

I take into account all of the above matters in considering whether or not a full care order is in the best interests of SB. I am also required by Article 53 (11) of the Children Order, before making a care order in respect of child, to consider the arrangements which the authority has made or proposes to make for affording any personal contact with the child and to invite the parties to the proceedings to comment on those arrangements.

Article 53(1) of the 1995 Order provides that-

> "Where a child is in the care of an authority, the authority shall (subject to the provisions of this Article) allow the child reasonable contact with-
> (a) his parents;
> (b) any guardian of his;
> (c) (deals with residence orders)
> (d) (deals with care orders under the High Court's inherent jurisdiction)"

This provision requires the Trust to provide contact with persons in the specified categories after the child is in the care of the Trust. None of the four categories of persons specified in Article 53(1) applies to the respondents.

Article 53(2) provides that-

> "On an application made by the authority or the child, the court may make such order as it considers appropriate with respect to the contact which is to be allowed between the child and any named person."

Article 53(4) provides that-

> "On an application made by the authority or the child, the court may make an order authorising the authority to refuse to allow contact between the child and any person who is mentioned in sub-paragraphs (a) to (d) of paragraph (1) and named in the order."

Article 53(5) provides that-

> "When making a care order with respect to a child, or in any family proceedings in connection with a child who is in the care of an authority, the court may make an order under this Article, even though no application for such an order has been made with respect to the child, if the court considers such an order should be made."

The Trust seeks an order prohibiting contact between SB and Mr and Mrs B. The Order of 30 May 2001 (described by counsel for the parties as a permissive order by agreement) under which Mr and Mrs B continue to have contact once per week, states in terms that contact continues to trial. Accordingly the present order will terminate in the event of a full care order being made and in any event the full care order has the effect of terminating previous orders.

However, Mr Toner QC for the Trust submitted that a prohibitory order would be appropriate and that such an order could be made under either Article 53(4) or Article 53(5). I am of the opinion that this Court does not have jurisdiction to make a prohibitory order against Mr and Mrs B either under Article 53(4) or under Article 53(5).

Article 53(4) relates to applications to the court to authorise the Trust to refuse contact between the child and a person in one of the four specified categories. As Mr and Mrs B do not fall within any of the four specified categories there is no power to make an order against them under Article 54(4).

In considering the operation of Article 53(5) it is instructive to compare the operation of Article 53(2) as outlined by Gillen J in Re *D (a child)(article53(2)order) (2001)* 1NIJB 163 when he was considering an application for an order prohibiting contact under Article 53(2). He referred to the decision of the Court of Appeal in England and Wales in Re *W (2000)1* FCR 752 in which it was held that the equivalent English provision to Article 53(2) did not create a prohibitory jurisdiction. Thorpe LJ explained (at page 577) that the primary purpose of the English section was to impose obligations and restraints on local authorities for children in care and continued-

> "The obligation is the duty to promote contact. The restraint is upon their discretion to refuse contact unless they have persuaded a judge that such a refusal is necessary. The power of the judge to supervise and control is the power to require the local authority to go further in the promotion of contact than the authority itself considers appropriate. The other power is to monitor the local authority's proposal to refuse contact in order to ensure that its proposal is not excessive."

In Re D Gillen J stated that he had concluded that Re *W* was a decision that must govern his approach and consequently he considered that Article 53(2) did not create a prohibitory jurisdiction. He made a comparison with Article 53(4) on the basis that it provided an instance where Parliament had given to the court the duty to decide on contact between the child and the specified categories of persons and even then the court simply authorised the authority to refuse contact and left the discretion with the trust. Gillen J stated (at page 168f)-

> "It would be entirely incongruous if, as Re W indicates, the court does not have power to make an order prohibiting a local authority from allowing contact between the child and a parent but did have the power to make an order prohibiting the local authority from allowing contact between a child and some other person."

The above analysis applies equally to Article 53(5). There is no prohibitory power in relation to Mr and Mrs B under Article 53(2) and there is no such power under Article 53(4). It would be equally incongruous if the Trust could achieve that result under Article 53(5). I conclude that there is no jurisdiction to make a prohibtory order in relation to Mr and Mrs B.

On the other hand Mr Long QC and Ms McGrenera QC, on behalf of Mr and Mrs B. propose that a contact order be made under Article 53(5), on the basis that there is jurisdiction to make such an order even though that is contrary to the care plan. The Trust submits that there is no jurisdiction to make an order for contact when that is contrary to the care plan. Re *W and B; Re W (2001)* 2FLR 582 raises the debate about the balance of power between the court and the care authority when making full care orders, and leaving matters to the Trust with no role for the Guardian ad litem in circumstances where the care plan may be inchoate or not approved by the judge or subsequently not implemented. One aspect of Re *W and B* deals with inchoate plans where the care plan is incomplete. In that event there was, prior to Re W and B, disapproval of the approach of making a series of interim orders as a means of maintaining supervision over the arrangements. However the Court of Appeal in Re *W and B* approved an approach involving a series of interim orders. It is plain in the present case that in relation to contact the care plan is clear and certain, namely there should be no contact. Another aspect of Re *W and B* arises where part of the care plan has not been implemented. The Court of Appeal adopted a scheme for starred essentials in the care plan so that the matter can be brought back to the court if the essentials are not implemented. Accordingly, there is some scope for continuing supervision by the courts after the making of a full care order although Re *W and B* is to be considered by the House of Lords.

The proposed contact in the present case raises the different situation where the court would be required to make an order contrary to a part of the care plan if it were minded to accede to the proposal. Some courts have felt unable to make a care order if they do not agree with all

of the care plan. In Re *J (1994)* 1FLR 253 Wall J set out a number of propositions concerning care orders. These included the absence of review by the courts once the care order has been made, this being to reflect the approach of the legislation. Further, the making of a care order should also be the end of the Guardian ad litem's role. The removal of review by the courts and by the Guardian rendered it necessary to scrutinise the care plan, which was described as an extremely important document. The court had either to approve the care plan and make a care order or refuse to make a care order. The mischief that was being addressed was the danger of using interim orders as a means of resurrecting what has been described as the now defunct supervisory role of the court.

A distinction can be made between care plans where contact is an issue and care plans where other features may be disputed. That distinction arises because, in relation to contact, there is a specific statutory regime under Article 53. The care plan should not, in effect, override the statutory powers in relation to contact, if it was thought appropriate to exercise those powers in a manner which was contrary to the care plan. I consider that the statutory scheme permits a care order to be made, and at the same time permits a contact order to be made under Article 53, if it is otherwise appropriate, even though that contact order would not be compatible with the contact arrangements proposed in the care plan. In making such orders the court would not be resurrecting a defunct supervisory role. The supervisory role in relation to contact is not defunct as it is expressly preserved by the statutory scheme.

However, it is not necessary to decide this issue in this case because I agree with the care plan arrangements for ending contact with Mr and Mrs B, subject to the farewell visit that the Trust has indicated would be appropriate. No formal application has been made for contact and the context of the present consideration of the matter is the submission made on behalf of Mr and Mrs B that if the care order is made the court should specify a level of contact despite the terms of the care plan. If I had though it appropriate I would have been prepared to make a contact

order if an application had been made, as I accept that the court would have power to make such an order under Article 53(5) for the reasons that I have given. However, in considering whether to make such an order I look to the child's welfare as paramount, and with the care plan being for the child to go to alternative adopters I accept the view that continuing contact with Mr and Mrs B may destabilise the care plan. It may also cause confusion to the child contrary to the stability required by the alternative permanent placement. If a care order were made, such contact would be inconsistent with the removal of child by reason of the risk factors which arise in this case. In the circumstances where a care order would be made I would accept the views of the social workers and guardian that it would not be in the child's interests to maintain contact.

Overall I am satisfied on the threshold criteria under Article 52 of the Order. I am satisfied in relation to the welfare provisions under Article 3 that the interests of the child are best served by the making of the care order. I am satisfied with the proposed contact arrangements and for the purposes of Article 53(11) I have considered those arrangements and have invited the parties to the proceedings to comment on those arrangements. I have applied Article 3(5) and considered whether the making of the care order would be better than not making any order at all. It is my conclusion that a full care order should be made in respect of SB and that no order should be made in relation to contact with any person.