

Neutral Citation no [2004] NICty 2

Ref: County 107

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

Delivered: **16/03/04**

S A J

APPELLANT

and

M H

RESPONDENT

JUDGMENT

OF

HIS HONOUR JUDGE HART QC,
RECORDER OF BELFAST.

DELIVERED

16 MARCH 2004

Appearances.

Mrs Litvack of counsel, instructed by Bernard Campbell & Co. for the mother.
Ms Bowman-McAlister of counsel, instructed by James Ballentine and Son, solicitors,
for the father.

- [1] This judgment will be made available in due course in anonymised form but nothing must be published, or referred to, which would identify the child concerned.
- [2] At Ards Family Proceedings Court on 10 December 2003 the court made an order increasing the contact to take place between the respondent (to whom I shall refer as the father) and his son M (to whom I shall refer as the child). An order was also made directing the appellant (to whom I shall refer as the mother) to sign a statutory declaration that M be known as M N J-H. The mother appeals against both orders.
- [3] The present appeal is the latest stage in a dispute between the mother and father over contact, and over the surname by which the child is to be known, and counsel informed me that the hearing of the present appeal was the 26th day the parties have been in court. To place the issues in context it is necessary to say something about the proceedings to date.
- [4] The mother and father are both professional people who work in the same place. They were married on 16 February 2001 but separated in acrimonious circumstances. The child was born on 4 February 2002, and on 21 February 2002 the father issued proceedings seeking contact and a specific issue order that the child should bear his surname. On 14 March 2002 the Family Proceedings Court made a residence order in favour of the mother but directed limited contact by the father to take place at the mother's house.
- [5] Although the parties are still married, the mother now uses her maiden name and the child has been registered with her surname. On 9 May 2002 the father again raised the question of the specific issue order. Contact was ordered to continue. On 21 June 2002 the mother filed a statement making a number of allegations that the father was essentially a selfish and neglectful husband who had displayed no interest in the child during her pregnancy and had not provided any financial support for the child after it was born. She justifies her decision to give the child her surname because he would be living with her family and she does not wish him to feel different in any way.

- [6] In his statement of 18 June 2002 the father set out the grounds upon which he sought contact and to have the child bear his surname. In particular he alleged that his wife not only failed to keep him informed of the birth of the child but directed that the hospital was to give him no information and that he only learnt of the birth of his child from a colleague at work. He described the existing contact arrangements and sought one overnight contact per week gradually building up to contact on alternate weekends, together with some weekday contact during the weeks when there was no weekend contact.
- [7] A social worker's report was prepared for the Family Proceedings Court hearing on 3 September 2002. In that report the social worker recorded that the mother stated that she did not name the father on the birth certificate "as she feels he had not taken his pre-parental duties seriously during her pregnancy". The social worker further recorded that the mother felt that as the child was residing in a home where all his family borne her name, she felt that it was appropriate and in his best interests that he be given that surname. The social worker recommended that there should be unsupervised contact for two hours at a time three times a week and that contact should not be restricted to being in the mother's family home. She also referred to the issue about the name of the child on the birth certificate and sought the advice of the court.
- [8] On 17 September the Family Proceedings Court directed that contact be increased to three hours on Monday and Saturday evenings, except during the fourth week when contact was to be two hours on Monday and four hours on Saturday. By this time a third firm of solicitors were representing the mother.
- [9] On 19 November 2002 the social worker reported that she had observed contact on two occasions and found it to be satisfactory. At the Family Proceedings Court on 3 December 2002 the court increased contact to six hours on alternate Saturdays and Sundays. The mother appealed this order but the appeal was withdrawn on 3 March 2002, apparently because legal aid was refused.
- [10] On 19 March 2003 the father brought a further application seeking contact because he alleged that the mother was not complying with the order made on 3 December 2002. In due course the relevant Trust appointed a new social worker to prepare an Article 8 report

because of the mother's complaints about the way in which other staff had dealt with her case.

[11] Following the appointment of a new, and more senior, social worker a further report was prepared for the Family Proceedings Court on 28 July 2003. This was an extremely comprehensive and detailed report. It recorded that as a result of intensive efforts at conciliation contact arrangements had been agreed in some detail, although the mother had some continuing reservations in view of her alleged concerns about her breast-feeding the child. However, there was still no agreement over the vexed issue of the child's name. On 28 July the matter was adjourned to the next day and on 29 July it was listed for hearing on 22 September when the court directed the attendance of both parties, the social worker and the mother's general practitioner.

[12] On 22 September the Family Proceedings Court, presided over by Mr Magill RM, made an interim order until 3 November 2003 permitting contact by the father with the child as follows:

“(i) For the next 4 week period contact to take place on Saturday from 8.30 a.m. until 6.00 p.m.;

(ii) Each Wednesday from 4.00 p.m. until 6.30 p.m.;

(iii) From 5th week contact to take place on Friday at 4.30 p.m. until Saturday at 12.30 p.m.”

[13] The mother appealed this order and the matter came before me for hearing on 15 October 2003. I made it clear during the course of the hearing that the order made on this appeal was intended be a final order in an effort to put an end to the continuing disputes about contact. I heard the oral evidence of both the mother and the father, and the following order was drawn up:

“(1) The court varies the order made at Ards Family Proceedings Court on 22 September 2003 and makes a Full Contact (sic) in favour of [the father] in the following terms:

(a) For the next 4 week period contact to take place on Saturday from 8.30 a.m. until 6.00 p.m.

(b) Each Wednesday from 4.00 p.m. until 6.30 p.m.

(c) From 5th week contact to take place on alternate Fridays from 4.30 p.m. until Saturday at 12.30 p.m. “

- [14] As the issue of the child's name was still outstanding in the Family Proceedings Court the matter came before it on 3 November 2003. The mother did not attend on that day, having written to the Family Proceedings Court to say that she believed the matter to have been concluded. She pointed out (correctly) that the contact order made on appeal was a full and final order, and asserted that her solicitor had told her that the father's solicitors were no longer proceeding with the application for a change of the child's name. She went on to say because the matter was concluded she no longer had solicitors acting for her.
- [15] Because the mother did not appear before the Family Proceedings Court on 3 November the court adjourned the matter to 18 November and directed her attendance. However, in the interim her solicitors wrote to the court by letter of 7 November 2003 saying that there may have been a misunderstanding on the part of their client as they also had been under the impression that they did not need to attend again, but they now realised that there was still a live issue in relation to the name of the child.
- [16] I was told by counsel that it was asserted on 18 November that there was an ambiguity in relation to the order made by this court at the conclusion of the hearing of 15 October. I was also informed that the Resident Magistrate (Mr Connor) was invited to transfer the matter to the Family Care Centre but declined to do so. However, I understand that he felt that he should withdraw from the case as the result of views of the appellant he expressed during the course of the hearing.
- [17] Before the next hearing in the Family Proceedings Court the father's solicitors wrote to the Family Care Centre on 21 November 2003 setting out what transpired at the Family Proceedings Court on 18 November. They alleged that the father was not receiving contact in accordance with the order made on 15 October, but then asserted that the order drawn up after the hearing of 15 October was not in keeping with the “spirit and intention of the decision”, and asked that the court amend the order to reflect the recommendations of the social worker's report dated 28 July 2003. Finally, the letter stated the following.

“Indeed our client asked that his Specific Issues Application [ie the name issue] before Newtownards Family Proceedings Court which is listed for contest on the 10th December be transferred to the Family Care Centre as within 24 hours of the last Hearing, at that court on 18 November 2003, [the mother] once again obstructed the contact between father and son”.

- [18] The parties and the Family Proceedings Court were informed by this court that the order drawn up after the hearing on 15 October was correct and that jurisdiction remained with the Family Proceedings Court.
- [19] The matter then came on for hearing on 10 December before a Family Proceedings Court presided over by Mr McNally RM. I was informed that at this hearing a further application was made that the matter should be transferred to the Family Care Centre. This application was refused. There then followed a lengthy hearing in which, to judge by the order ultimately drawn up, a number of issues were considered. The first was contact on Christmas Eve and New Years Eve. The second was the issue of the child’s surname and an order was made which is the subject of the present appeal and to which I shall refer later in this judgment. The father had lodged a C2 dated 26 November 2003 asking that contact be redefined in accordance with the social worker’s report of 28 July 2003. In the event, the court again ordered contact from 4.00 p.m. to 6.30 p.m. on Wednesdays, and overnight contact on alternate Fridays between 4.30 p.m. on Friday until 12.30 p.m. on Saturday. In addition contact was ordered to take place between 10.00 a.m. and 6.00 p.m. on those Saturdays where there was not overnight contact from Friday night. The net effect of this was therefore to add a period of eight hours contact on those Saturdays when there was no continuing overnight contact from the Friday.
- [20] The mother has appealed against the new contact order and the order relating to the child’s name.
- [21] Given the history of this litigation it is unfortunate that the applications made on 18 November and 12 December to have the proceedings transferred to the Family Care Centre were refused. Whether or not there was a genuine misunderstanding on the part of the mother as to the extent of the order of 15 October, the father was alleging that the mother was in breach of a contact order made

on appeal a short time before as well as inviting the court to redefine contact. It is equally unfortunate that the father's representatives, having raised the issues which they did on 18 November did not appeal the refusal of the Family Proceedings Court to transfer the proceedings. Had either of these courses been adopted, then any dispute, real or contrived, between the parties as to what this court intended by its order of 15 October could have been speedily resolved. A transfer would also have made it unnecessary for the Family Proceedings Court to devote a great deal of time to issues which would inevitably be appealed. I hope that should applications for transfers be made in similar circumstances in future Family Proceedings Courts will show a greater willingness to transfer proceedings to a Family Care Centre under Article 8(1) of the Children (Allocation of Proceedings) Order (Northern Ireland) 1996 whether "upon application by a party or of its own motion".

[22] In any event, I consider that the Family Proceedings Court should not have proceeded to re-open the issue of contact at the hearing of 12 December. The courts are all too familiar with disputes over contact where the parties are fighting their own battles without any regard for the welfare of the child. Whilst circumstances can change which justify fresh contact applications being made, it is not in the interests of justice or of the children that courts permit contact orders to be revisited unless there has been a material change of circumstances since the earlier order. This is particularly the case when the contact order was made on appeal. An order made on appeal from a Family Proceedings Court is binding on that court and it should not re-open such an order unless there is a material change of circumstances.

[23] The order of this court of 15 October was a considered order made in the light of a long and acrimonious dispute between the parties and the court made it clear that the order was intended to bring the contact dispute to a conclusion. It was my view that the contact ordered was appropriate for a very young child with two working parents because it would allow the child to develop interests and friendships in the locality where it lives as it grows older on those Saturdays when the father did not have overnight contact on Friday nights. The order made by the Family Proceedings Court on 10 December 2003 would significantly interfere with that process because it would have the effect that all, or a substantial part, of each Saturday will be spent by the child many miles away from its

home. There has been no change of circumstances, and I have reinstated the contact order of 15 October.

[24] I now turn to consider the issue of the child's surname. The remarks of Lord Hobhouse in *Dawson –v- Wearmouth* [1999] 1 FLR at 1178 are pertinent to this case.

“It has often been observed that the use of surnames is among the questions which give rise to the most deeply felt disputes between parents. As in other areas, the parents are liable to see the question raised as reflecting upon their own rights. ... Once the dispute has arisen, the paramount consideration is the welfare of the child. The attitude and views of the individual parents are only relevant insofar as they may affect the conduct of those persons and therefore indirectly affect the welfare of the child.”

[25] In *Re W, Re A, Re B (Change of Name)* [1999] 2 FLR 930 at 933 and 934 Butler-Sloss LJ summarised the considerations to which a court should have regard when considering disputes about a child's surname.

“(9) The present position, in summary, would appear to be as follows:

- (a) If parents are married, they both have the power and the duty to register their child's names.
- (b) If they are not married the mother has the sole duty and power to do so.
- (c) After registration of the child's names, the grant of a residence order obliges any person wishing to change the surname to obtain the leave of the court or the written consent of all those who have parental responsibility.
- (d) In the absence of a residence order, the person wishing to change the surname from the registered name ought to obtain the relevant written consent or leave of the court by making an application for a specific issue order.
- (e) On any application, the welfare of the child is paramount and the judge must have regard to the s 1(3) criteria.

- (f) Among the factors to which the court should have regard is the registered surname of the child and the reasons for the registration, for instance recognizance of the biological link with the child's father. Registration is always a relevant and an important consideration but it is not in itself decisive. The weight to be given to it by the court will depend upon the other relevant factors or valid countervailing reasons which may tip the balance the other way.
 - (g) The relevant consideration should include factors which may arise in the future as well as the present situation.
 - (h) Reasons given for changing or seeking to change a child's name based on the fact that the child's name is or is not the same as the parent making the application do not generally carry much weight.
 - (i) The reasons for an earlier unilateral decision to change a child's name may be relevant.
 - (j) Any change of circumstances of the child since the original registration may be relevant.
 - (k) In the case of a child whose parents were married to each other, the fact of the marriage is important and I would suggest that there would have to be strong reasons to change the name from the father's surname if the child was so registered.
 - (l) Where the child's parents were not married to each other, the mother has control over registration. Consequently, on an application to change the surname of the child, the degree of commitment of the father to the child, the quality of contact, if it occurs, between father and child, the existence or absence of parental responsibility are all relevant factors to take into account.
- (10) I cannot stress too strongly that these are only guidelines which do not purport to be exhaustive. Each case has to be decided on its own facts with the welfare of the child the paramount consideration and all the relevant factors weighed in the balance by the court at the time of the hearing."

- [26] The circumstances leading up to the birth of the child; the mother's reasons for having the child registered with her surname only; the attitude of the mother towards the father's attempts to obtain information as to the name of the child; the contents of the birth certificate, and the mother's attitude to information being given to the father about the child's health were all explored in some detail in the present appeal.
- [27] The mother and father separated in the Autumn of 2001 when the mother left the matrimonial home and returned to live with her parents. Despite the fact that the mother and father are professional people who work in the same place, contact between them thereafter appears to have been solely through the medium of solicitors' letters. For some weeks after the initial separation the father was not at work and then the mother was off work prior to the birth of the child. However, it appears that for some weeks towards the end of 2001 they were both at work but did not communicate directly with each other, even on occasions when they were in the same room as colleagues.
- [28] The evidence was that the first letter in the exchange of correspondence came from the mother's solicitors when they wrote on 8 October 2001 saying that divorce seemed inevitable. The father's solicitors replied on 7 December but that letter was not put in evidence. On 2 January 2002 the mother's solicitors said that they had sent a copy of the letter of 7 December to the mother for her attention. They stated that the mother "instructs us to advise that she is not at present in the position to respond to this correspondence owing as she is rightly concerned with her health and the forthcoming birth of her first baby next month." On 22 January the father's solicitors wrote to the mother's solicitors in response to that letter asking for the anticipated date of the baby's birth as the father wished to visit the child in hospital. They also stated that the father "requires the child's surname to remain as [H] and not any other name. Please confirm that our client's wishes will be adhered to."
- [29] No reply was sent to that letter and the child was born on 4 February. On 5 February the birth of the child was registered by his maternal grandmother with his mother's maiden name as his surname. Where the registration form provides for the name and surname and occupation of the father these were left blank.

[30] The mother's evidence was that she had discussed the registration procedure with the Registrar's office and it is therefore apparent that the mother had decided before the child was born that it would be registered in her maiden name. I shall return to this later.

[31] The mother's reason for registering the child with her surname, and for continuing to object to any change in that name, is that the child would be brought up in the same household as his maternal grandparents and therefore she does not wish him to have a different name from the other people who live in that household or to feel different in any way. He has also been baptized in that name and the mother said, and I see no reason to disbelieve her in this respect, that means a lot to her.

[32] The father's concern is that although he has an excellent relationship with his son through the contact directed by successive court orders, he wishes to maintain a tangible link with the child through the child bearing his name. The father is also concerned that, as it was suggested to the mother in cross-examination, that there has been a campaign of secrecy to exclude him completely from the child's life and that he is concerned contact will not take place in the future, even though it has been ordered by the court.

[33] In support of his belief the father points to the mother's conduct in:

- not informing him of the child's birth;
- registering the child with her surname despite the father making his desire clear that the child should bear his name;
- withholding that information from the father for a considerable period of time;
- trying to prevent the father being given any medical information about the child.

[34] I shall deal with each of these in turn. The mother was pressed very strongly in cross-examination about why the father was not told of the child's birth. Her response was that she didn't receive letters which had been sent by the father's solicitors to her parents because her parents choose to keep some things back from her because they did not wish her to be under stress in the concluding parts of a very difficult pregnancy. She was also asked why the father was not invited to, or informed of the baptism to which she

responded that he could have been told of these arrangements by their work colleagues.

- [35] It is clear that the mother made the decision well in advance of the birth of the child that the child would be registered in her name. Attached to her statement of 21 June 2002 is a supplementary statement in which she describes the contact she had with the local Registrar's office covering the area of the hospital where the child was born. She describes how she paid a visit to that office on 31 December 2001 where she was informed that it was possible for her to register the baby under her surname and that it was not necessary to state the father's name. I am satisfied that she deliberately kept the father in ignorance of what she planned to do.
- [36] The father also points to the difficulties he had in finding out what had happened about the registration of the child. On 22 February 2002 the mother's then solicitors wrote saying that they would forward a copy of his birth certificate when it was received from "child benefits".
- [37] However, I see on the court file a letter of 20 March 2002 from the General Register Office exhibited to the father's C2 of 9 May 2002 that the father's solicitors wrote to that office and were sent a copy of the birth certificate dated 15 March.
- [38] The father also points to the instructions given by the mother to the child's general practitioner that she was the only person who was to receive information on the child. On 17 March 2003 the general practitioner wrote to the father's solicitors in the following terms.

"I am this child's General Practitioner. The child lives with it's mother who has care, custody and control of this child. The child has recently been unwell, unable to go to access due to it's medical condition, and I have given its mother written evidence of this.

I understand [the father] turned up at surgery unannounced demanding information. This is clearly not the way to ascertain information. The child's mother has requested to me that she be the only one who receives information on the infant, and she being the parent of the child who has custody, I have acceded to her wishes. Perhaps you would let me know if this is not the correct course in law."

[39] The mother repeated on several occasions that she wished the child to bear her name so that he would have the same name as the others in the household in which he grows up. However, it is illuminating that she has given a somewhat different reason in the past as recorded at page 6 of the social worker's report prepared for the court on 3 September 2002.

“ Birth Certificate.

[The mother] stated that she did not name [the father] on the birth certificate as she feels he had not taken his pre-parental duties seriously during her pregnancy. [The mother] further stated that this decision had been carefully thought through and advice from the duty and head registrars had been taken.”

[40] Having considered the mother's evidence on these matters I found her to be evasive and at times untruthful. I am satisfied that prior to the birth of this child she decided that she was going to register the child with her own surname and that the father would be kept in ignorance of this for as long as possible. I am satisfied that she knew that he wanted to see the child in hospital and ensured that he would not be given this opportunity by deliberately concealing from him the expected date of delivery of the child. I am satisfied that she has tried to prevent the father from being given information as to his child's state of health to which he is entitled. I am satisfied that her attitude towards the name of the child and contact is motivated solely by her continuing and intense dislike of, and resentment towards, her husband as a result of the circumstances leading to this separation rather than a genuine belief in the reasons that she has put forward for naming the child with her surname. I am satisfied that the father's concerns that she will do everything she can to exclude him from involvement in this child's life are well founded.

[41] The authorities which I have already cited establish that each case has to be decided on its own facts with the welfare of the child the paramount consideration. I bear in mind that the mother has in the past reluctantly conceded contact only in the face of court proceedings. I dealt with her attitude towards contact in the following passage from my judgment on the appeal hearing of 15 October 2003.

“I consider that it is very much in the interests of the child that amongst the community of those to whom [the child] is exposed

should be his father. That is conceded in effect by [the mother] but I believe reluctantly conceded and only conceded under the stress of the logic of these proceedings. Where she was pressed on these matters I regret to say I found her evasive and it is quite clear from the chronology of events and some parts of her evidence that she has reluctantly conceded contact only in the face of Court proceedings on a number of occasions in the past and I have no doubt that her objection to increased contact and overnight contact is entirely motivated by her dislike of her husband and not really by her concern for [the child] because those concerns, whilst of course genuine, are in my view misplaced insofar as she asserts that he would be harmed by increased contact and overnight contact.”

[42] Despite the resistance of the mother to increased contact in the past, this child will have contact with his father on a substantial basis. I am satisfied that unless the father’s name is in some way linked with the child’s name that the mother will seek to exclude the father from every legitimate involvement in, and area of enquiry which he may wish to make into, the upbringing of his child. I am satisfied that such attempts will not be in the best interests of the child. As Hale LJ pointed out in *Re R (Surname)* [2001] 2 FLR 1358 at 1362.

“The crucial point, however, is that it is important for a child for there to be transparency about his parentage and for it to be acknowledged that a child always has two parents ...”.

[43] In this case if it is not publicly acknowledged that this child has two parents as he grows older and becomes aware of the significance which others attach to names he will be subjected to quite undesirable tension and pressure by his mother’s efforts to exclude any connexion with his father from his life. This will not be in the child’s interests and the court must therefore consider how this can be avoided.

[44] A possible resolution of the impasse created by the insistence of both parents that the child bear their surname to the exclusion of the other’s was raised by the social worker in the report she prepared for the court on 28 July 2003. At paragraph 7.3 she suggested that both parents’ surnames should be included in a hyphenated name. The father was, and is, prepared to agree to that but the mother was not, and is not, prepared to agree to it. The

social worker recommended that the court consider directing that the child be allowed to use both names, and at the Family Proceedings Court on 20 December 2003 the court ordered that the child be known by a hyphenated surname with the mother's surname first. The father confirmed to me that he was not concerned as to which name came first.

- [45] In *Dawson –v- Wearmouth* Lord Hobhouse pointed out that the court cannot change the registration, it can only make an order directing the mother to use a different name from that which has been registered.

“The court cannot change the registration. It can only make a s. 8 order requiring the mother to use a different name from that which has been registered. This fact also governs the procedural position under the Children Act. The mother having registered the child and having commenced to use the registered surname, it is necessary for the father to apply to the court under s. 4 for an order granting him parental responsibility and under s. 8 for a specific issue order requiring the mother to use a different surname. The father then has to make out a positive case in accordance with s. 1 of the Act that it is in the interests of the child that the order should be made. If he fails to make out that positive case, his application will fail.”

- [46] As the social worker pointed out when giving evidence before me, it is becoming more fashionable for a child to have both parents surnames and as this child is only two he would not have to grapple with the implications of any changes in his name, for example changes of name badges at school and matters of that sort.

- [47] Counsel for the father referred me to the comments of Hale LJ in *Re R* at p. 1363.

“In my judgment, parents and courts should be much more prepared to contemplate the use of both surnames in an appropriate case, because that is to recognise the importance of both parents”.

- [48] Whilst these comments were made in the particular context of a case where the child was to be taken to Spain where this practice is common, nevertheless they are of general application.

[49] In the particular circumstances of the present case I am satisfied that it is in the interests of this child's welfare that his father's role in his life be publicly acknowledged by his being known by the hyphenated surname of J-H and I so order. The Family Proceedings Court directed the mother sign a statutory declaration to that effect. This would seem to be unnecessary because the court orders the mother (and by necessary inference all others) to use a particular name as can be seen from the passage from Lord Hobhouse's speech in Dawson -v- Wearmouth quoted at [45] above. The Family Proceedings Court also ordered that the father's details be entered on the birth certificate but no statutory or other authority permitting this to be done has been cited, and again in would appear to be beyond the court's powers in the light of Lord Hobhouse's observations.

[50] I allow the appeal in part. This is a final contact order. I have also attempted to deal with issues connected with the child's name and the father's right to medical information that have already been, or may be anticipated to be, a source of dispute in the future. The following order will be substituted for the order of the court below of 10 December 2003.

1. The mother and the father shall call the child M N J-H.
2. The mother shall take all necessary steps so that the child will henceforth be called M N J-H by everyone. In particular, she shall give the necessary instruction to this effect to any medical practitioner or school authority responsible for his medical or educational requirements now or in the future.
3. The father is entitled to be furnished with all information of a medical or educational nature relating to the child.
4. The father is to have contact with the child as follows.
 - (a) Each Wednesday from 4.00 p.m. until 6.30 p.m.
 - (b) On alternate Fridays from 4.30 p.m. until Saturday at 12.30 p.m.

[51] The mother has succeeded in her appeal to the extent that the contact order of 15 October has been reinstated. This issue was raised by the father at the lower court and it should not have been.

However, the mother has failed in her appeal against the order of the Family Proceedings Court that the child be known by the surnames of both parents. In these circumstances I feel that the appropriate order as to costs of the appeal is that there be no order as to costs between the parties.