

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

Between

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X (A FATHER)

Appellant

and

A HEALTH AND SOCIAL CARE TRUST

and

H (A MOTHER)

Respondents

and

K

First Intervenor

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O'HARA J

Interim Judgment

[1] In order to protect the interests of young children, this judgment is given in anonymised form. Nothing is to be disclosed which might reveal their identities or the identities of any of the family members referred to in the judgment.

[2] This case involves an appeal from the Family Care Centre, specifically from a judgment dated 5 March 2014 in which it was decided that a child (C) had been sexually abused by her father X and by K, one of her elder brothers. For the reasons set out below I will allow the appeal and invite the parties to consider how the issues which remain should be advanced in this court. I do not intend to remit the case for any further hearing to the Family Care Centre.

[3] The appellant father was represented by Mrs Keegan QC with Miss Paula McKernan. The appellant K, was represented by Ms Walsh QC with Ms Martina Connolly. The Trust was represented by Mr Toner QC with Mr Andrew Magee. The mother was represented by Mr McGuigan QC with Ms Cathy Hughes. The guardian ad litem was represented by Ms McBride QC with Ms Kathy McKee. I am grateful to counsel for their submissions and assistance.

[4] The manner in which appeals from the Family Care Centre are heard in this jurisdiction has been considered on a number of occasions, notably by Gillen LJ in McC v McC [2002] NI Fam 10 and more recently by Maguire J in SMcC v Southern Health & Social Care Trust [2013] NI Fam 2. It is unnecessary to repeat what has been set out in those cases save to recognise that they are now to be read in light of Re B (Care Proceedings: Appeal) [2013] 2 FLR 1075.

[5] As the learned trial judge said, the background to this case is complex and disturbing. At the time of her judgment A, B and C were sisters aged 11, 8 and 6 with two elder brothers, S who was 24 and K who was 21. The parents had separated in or about 2008 with the father leaving the home although he continued to have regular contact with the children. The mother has a history of mental health issues and chronic alcoholism. Social services had been involved with the family since 1999 when concerns were raised about the sexualised behaviour of K who was aged 7 at the time. At that time both K and S were placed on the Child Protection Register. There was a particular concern held by social services because K's paternal uncle had been convicted of a Schedule 1 sexual offence.

[6] On 15 July 2011 A, B and C were removed from the care of their mother on foot of a Police Protection Order. The children were found on mattresses in their home with their mother who was so intoxicated that she was unable to remember their dates of birth. K was also found drinking in the bedroom in the same home with 3 male friends. Concerns about the children's welfare had been apparent for some time - on one occasion C had been found wandering on the road at night.

[7] Care proceedings were instigated because the mother who is a vulnerable adult was clearly unable to look after the children. The girls have not been returned to her care. She consented to care orders being made in the Family Care Centre subject only to a dispute about the frequency of her contact with them. The learned trial judge ruled that her contact should be once per fortnight.

[8] During the time the children were in foster care pending the hearing of the Trust's applications for care orders, disclosures were made to foster carers which suggested sexual abuse. These disclosures came overwhelmingly from C. As a result C was referred to the Childcare Centre which specialises in helping children (without leaving them) to speak about their experiences. Over the course of six sessions between May and July 2012 C said nothing relevant about her father but she did implicate her brother K and to a lesser extent her brother S. It was not until after

this work was completed in the Childcare Centre that C first mentioned her father. She then did so again on a number of occasions.

[9] These disclosures at the Childcare Centre along with other disclosures made to foster carers were obviously worrying. They were made by a girl who was only 4 when she was removed from the family home. The evidence before the Family Care Centre included analysis by Dr. F Leddy and Dr. R Holliday of how the disclosures were made, where they were made and whether C was led in any way to make them. It was relevant to this exercise that C had the degree of developmental delay which has been reduced as she has been better looked after in care.

[10] In a number of respects the learned trial judge found the evidence of Dr. Leddy more persuasive than that of Dr. Holliday. Given the stage at which this appeal now stands, I will state only the following on all of the evidence of abuse, including the evidence from the Childcare Centre, the two expert witnesses and some of the foster carers.

- (i) It is probable that C was sexually abused – neither appellant takes issue with that finding.
- (ii) In light of her age and family circumstances it is probable that C was abused from within her own family circle – this does not exclude the possibility of some abuse by non-family members but is probable that most abuse was from family members. This proposition was not formally conceded by the appellants but was not resisted strongly.
- (iii) In light of (i) and (ii), the possible pool of perpetrators includes both K who lived at home and her father who did not but who saw her regularly.

[11] The decision of the learned trial judge went further than the findings I have set out above. She found that both K and the father had probably abused C. Unfortunately, paragraph 75 of her judgment which is supposed to explain the basis for that finding does not actually do so. It contains 13 sub-paragraphs but in none of them is there an explanation for the conclusion that the father abused C and few of the sub-paragraphs set out an explanation for the finding that K did so. While it may very well be that such findings could have been made entirely justifiably, the final critical paragraph lacks the reasoning required to support such a conclusion and cannot therefore stand.

[12] I pause to mention one specific issue about the evidence before the Family Care Centre. The father gave evidence denying any abuse and was cross-examined on that evidence. K did not give oral evidence. On behalf of K, Ms Walsh suggested that any questioning would not have added to his denial or advanced the case either way. I do not agree. There is clear authority in this jurisdiction and beyond that it is open to a judge to draw an inference against a person who declines to give evidence in circumstances when he might reasonably be expected to do so. In this case I

would certainly have expected K to give evidence and I would have drawn an inference against him for not doing so. What inference can actually be drawn varies depending on the circumstances but in this case I believe it would have been open to the learned trial judge to draw an inference against K that the strength of the allegations against him was added to by his silence in court.

[13] The judge's conclusions that the father and K probably sexually abused C may have been based in part on Dr. Leddy's first report in which she stated:

"In my view C has made very reliable allegations of sexual abuse by her brother K ... and reliable allegations of sexual abuse by her father. The allegations against S are more uncertain. It is certainly possible that others have been involved ... the fact that C implicates more than one perpetrator does not make the allegations against her father less reliable."

[14] I have two concerns about that finding. The first is that Dr Leddy did not give that answer by way of a response to a question which she was asked on her instructions. Instead, she went beyond the question and gave a hierarchy of the probability that the disclosures and allegations made by C were credible in relation to specific individuals. My second concern is that it seems to me that this evidence went beyond the remit of even an expert witness since the view which she expressed was on an issue which was ultimately for the trial judge. In any event, if the trial judge accepted that evidence, she had to explain why she did so e.g. would it matter that the father's name was not mentioned at any point during any of the six sessions at the Childcare Centre, would it matter that he was out of the house most of the time and that there was no context given by C to the circumstances in which he abused her? It may be that none of these issues would matter very much at all but nowhere in the judgment is there any weighing up of the strengths and the weaknesses of the disclosures.

[15] Mr Toner for the Trust accepted, properly in my view, that the written judgment from the Family Care Centre could not be stood over in relation to the father. He was slightly less inclined to make the same concession in relation to K who is referred to in the 13 sub-paragraphs at paragraph 75 of the judgment but not, in my view, in a way which is sufficiently clear and specific for the judgment to stand.

[16] As a result of the findings against him on abuse the father is allowed no contact with C pending the outcome of ongoing therapeutic work and he has contact with A and B only four times per annum. K has no contact at all with any of his sisters.

[17] In light of this interim decision the parties have to consider what course they wish the appeal to take next. It is for the Trust to decide whether it will apply to me

to continue the appeal by re-hearing any of the evidence so that I will decide whether the father and/or K probably abused C. In considering the possibility of that way forward the Trust will no doubt take account of the fact that the father is not seeking the rehabilitation of the children to him, presumably because he has not been a significant carer for any of the three girls since he left them with their troubled mother in 2008/09.

[18] K has never been a significant carer for A, B or C. He does not advance a case that the children be removed from foster care and placed with him. The only possible further issue to be raised on his behalf is the question of contact. In that regard he is in a similar position to his father. I will allow the parties some time to consider the way forward.