

Neutral Citation No: [2022] NIFam 18

Ref: McF11840

ICOS: 10/047587

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

Delivered: 16/05/2022

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

Between:

A FATHER

Applicant

-v-

A MOTHER

Respondent

IN THE MATTER OF DY (A FEMALE CHILD AGED 14 YEARS)

The father represented himself
Ms Corr of Kelly & Corr Solicitors for the mother

McFARLAND J

Introduction

[1] This is an appeal by a father against the decision of the Londonderry Family Care Centre of 16 February 2022 whereby it refused the father's application for a direct contact order with his 14 year old child. The order affirmed an existing order providing for indirect contact only using letters, cards and presents.

[2] This judgment has been anonymised to protect the identity of the child. I have used the cipher DY for the name of the child. These are not her initials and have been chosen randomly. Nothing can be published that will identify DY.

Background

[2] DY was born in the spring of 2008. Her parents were not married and separated as a couple shortly after her birth. The parents share parental

responsibility. She has been the subject of extensive litigation between the parents. This commenced in 2010 and there have been 91 separate court appearances. It is not necessary to set out the history of the litigation in detail, save to state that DY lives with her mother and she did have direct contact with her father up until the summer of 2017. By an order of the Family Proceedings Court of 22 February 2018 indirect contact only was permitted. That order was appealed unsuccessfully to the Family Care Centre.

[3] On 9 April 2021 the father applied to vary the 2018 order by the introduction of direct contact. The Family Proceedings Court transferred the case on the grounds of complexity. The Family Care Centre ordered the Trust to provide an Article 4 Children Order report, and on 16 February 2022 after hearing evidence from the author of the report and from the father it dismissed the father's application and reaffirmed the existing order with a slight adjustment to provide for communication from DY to her father. It also imposed an order under Article 179(14) of the Children Order requiring the father to seek leave from the court before issuing any further proceedings in relation to the child.

Grounds of Appeal

[4] There are four stated grounds of appeal:

1. The decision was contrary to the best interests of DY;
2. The Article 179(14) order was unnecessary and unwarranted;
3. The Family Care Centre refused to allow for the instruction of a 'family focussed child psychotherapist' to ascertain the true wishes of DY;
4. The Family Care Centre refused to allow evidence to be adduced concerning a court order made on 11 November 2010.

The law as it relates to this appeal

[5] The Supreme Court in *Re B* [2013] UKSC 33 held that an appellate court in family matters should not interfere with a decision of a first instance judge unless the judge has erred in law or was wrong. It is not necessary for the appellate court to conduct an entire decision-making process itself by way of a re-hearing of the case.

[6] All decisions relating to the upbringing of a child, which will include decisions about contact with a parent, must be determined on the basis of the best interests of the child. This will include taking into account the provisions of Article 3(3) of the Children Order, or the 'welfare checklist' as it is sometimes referred to. The checklist is:

- a) The ascertainable wishes and feelings of the child;

- b) Their physical, emotional and educational needs;
- c) The likely effect on the child of any change in circumstances;
- d) The child's age, sex, background and any other relevant characteristics;
- e) Any harm which the child have suffered or are at risk of suffering;
- f) How capable of meeting the child's needs is each of the parents, and any other person considered to be relevant;
- g) The range of powers and orders available to the court.

The Appeal

[7] The court had available to it the papers which had been before the Family Care Centre – the C1 application, the father's statement of evidence, the mother's statement of evidence, a further statement from the father and the court children's officer's report. It also had the appeal papers – the notice of appeal, skeleton arguments from the father and the mother, and a transcript of the judgment of the Family Care Centre.

[8] The father's main argument centred on what had been stated to be the wishes and feelings of DY as reported by the mother and by the court children's officer. His case is based around what he has described implacable hostility by the mother which has resulted in parental alienation. The father believes that DY's attitude is now a result of her hostility towards the father given his refusal to permit her to take the sacrament of Holy Communion and by DY misinterpreting the events of July 2021 when the father's then girlfriend cut short a holiday in Spain to bring DY back to Northern Ireland.

[9] These holiday events culminated in the Family Proceedings Court's decision of 22 February 2018 which was upheld on appeal on 22 June 2018. This order confirmed that there should be no direct contact and introduced the indirect contact regime. The father still contests the evidence presented before the court in 2018 and in particular the evidence of his former partner. That evidence was that the father had been intoxicated, was acting in an emotionally unstable manner including attaching a ligature around his neck and attempting to strangle himself. DY was said to have witnessed this and was brought home after one day of the holiday. Her mother reports that DY was extremely distressed by her father's conduct and did not recover emotionally from the incident for a considerable period.

[10] The father continues to assert that the evidence was false and that DY did not witness the incident.

[11] His main case was that whatever happened it is now a long time since the incident, his circumstances have changed and that he has adequate supports in

place.

[12] He stated that the expressed wishes and feelings of DY are therefore based on false information and by views imposed on her by her mother.

[13] He also argued that two case-management decisions prevented him from presenting his case at the lower court. The first was a failure to grant him leave to instruct a family focussed child psychotherapist to ascertain the true wishes of DY. It is uncertain as to the basis of this ground as the father never placed before the court a C2 application for leave for him to instruct such an expert. This would have set out the identity of the expert, the expertise of that expert, the letter of instruction, the requirements of the report and when the report would be completed.

[14] A second case-management decision was the refusal to allow him to adduce evidence concerning an order of the court of 11 November 2010. That order was a specific issue order preventing the child from receiving any further sacraments or instruction without leave of the court. The potential relevance was that DY had told the court children's officer that she felt humiliated as she had not been able to take her first Holy Communion with her friends. The mother had attempted to have this order revoked but the court had refused to do so. The background is that the parents are not of the same religious belief and the father objected to the child being brought up in the religious belief of her mother. As both share parental responsibility the court was compelled to resolve this issue after it had emerged that the mother had arranged for the child's baptism in 2009 without the father's knowledge. The Family Care Centre refused to allow the father to adduce evidence about this background and the order given the passage of time, and the father objected to this as he asserted it was evidence of the mother's contempt of court, coercive control and parental alienation.

[15] The final ground of appeal related to the Article 179(14) order which the father stated was imposed to prevent him from proving the coercive control of the mother over the child. Although acknowledging the numerous applications by both parents before the courts, the father said there was no evidence he was a vexatious litigant and should be allowed to apply direct to the court, without going through the leave phase.

Consideration

[16] I will deal with the grounds of appeal in the following sequence - case management decisions, the court's final order, and the Article 179(14) order. Case-management decisions will very rarely be interfered with by appellate courts as the judge managing the case and hearing the evidence and argument is best placed to make these decisions as they arise. A judge has a wide range of discretion vested in him or her to ensure that the case is dealt with expeditiously and fairly. The application for leave to instruct an expert appears to have been made without prior notice, without a written application, and without identifying an expert. The

purpose of the report was in general terms and there was no timescale offered. The child's wishes and feelings were clearly relevant given her age, and it was well within the judge's discretion to reject the father's application, to use the Article 4 report and use an expert social worker who was well able to work out a child's actual wishes and feelings, as well as identify any factors which may have operated to influence the child. The use of an expert as suggested by the father would have resulted in delay. I also consider that the father did not really know how much such an expert would have charged for the report. The decision to refuse the father's application was well within the range of decision making open to the court and in my view was the correct one.

[17] Similarly, a decision about adducing evidence is for the trial judge to make. The facts about the religious upbringing of the child were not in dispute. The child had an expressed view about a desire as to her religious upbringing. The reality was that the father was well within his legal rights when exercising his parental responsibility to prevent the child taking her first Holy Communion. However, as the child knows that it is her father preventing her, then this will have inevitable consequences. The father can prevent this aspect of DY's religious upbringing but he cannot complain when the child blames him for stopping it. Participation in sacraments of this nature is much more than simple religious events. For young people they are both religious and cultural and are very often seen by the participants and their friends and family as a 'rite of passage' and part of growing up. The fact of the father's role and the impact on the child were not really in dispute. The judge quite properly prevented the court being side-tracked by this issue. The background facts were known to the court as were the consequences of the father's decision. The purpose of adducing the evidence was an attempt to justify to the court the father's reasoning for making his decision back in 2010 and his continuing approach to the issue. That is largely irrelevant. It is a genuinely held view of his, but he must accept the consequences when the decision, or decisions, cause upset to his daughter and as to how she apportions responsibility.

[18] I am satisfied that the father has not shown in any way that either of these case-management decisions were wrong.

[19] The crux of the case comes down to the wishes and feelings of DY. She has now just turned 14 and was 13 at the time of the hearing. The father appeared to object to her being described as a 'young woman' by the court children's officer referring to the UN Convention on the Rights of the Child ("UNCRC"), although his reference was to the definition of a child as being under 18. That, correctly, defines the difference between an adult and a child, but not, to use the context of the court children's officer's description, the difference between a young woman and a girl.

[20] The court was considering the welfare and best interests of the child at that time, just short of her 14th birthday. Her wishes and feelings, given her age and maturity cannot be ignored. The court children's officer is well able to identify genuine and not so genuine wishes and feelings expressed by children. The father

dismisses what his daughter is saying suggesting that these views have been planted there by her mother and as a result of the lying reports of his ex-girlfriend. The incident in Spain has already been the subject of court proceedings and the decision was confirmed on appeal. The court made findings of fact in respect of the girlfriend's evidence. It accepted her evidence. These are the events which the child observed and remembered. Any 9 year old child witnessing such a scene as described by the girlfriend is likely to react in a similar way. The father remains in denial and attempts to reopen the issue, rather than address the emotional harm caused to the child, the fracturing of his relationship with her and what he needs to do now to mend the relationship.

[21] Some progress appears to have been made by the father in relation to his life. He has a secure and responsible job but that was not the issue for the Family Care Centre. The issue was the expressed wishes and feelings of a mature and intelligent 14 year old girl. The court must respect those wishes. She does not want to stop all contact but only wishes the contact to be at its current level. She has agreed to respond to her father and this has been provided for in the order.

[22] The decision of the Family Care Centre was the correct one and it applied the appropriate test as set out in Article 3(3) of the Children Order. The father referred to various international conventions such as the ECHR and the UNCRC. Article 8 of ECHR (right to respect for private and family life) is an important right as are the rights contained in the UNCRC, but they are rights set out in generalised terms. The best interests and the welfare of the child are the overriding concerns of the court. Article 3.1 of the UNCRC states:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

and with specific reference to the issues raised in this case, Article 9.3 provides:

"States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, **except if it is contrary to the child's best interests**"
[my emphasis]

[23] The decision relating to the indirect contact order was the correct one and the father has not shown that it was in anyway wrong.

[24] This brings me finally to the Article 179(14) order. This is not an order preventing the father from bringing proceedings. It is an order requiring him to obtain the leave, or permission, of the court to issue proceedings.

[25] There have now been over 90 court appearances. It is not in the child's interests that the case keeps coming back to court. It is an immense financial burden on the mother who is in employment and is not able to access legal aid. She has retained the services of a solicitor which she is entitled to do to protect her interests. The father has no financial penalty as he chooses to represent himself. The court could at some stage start to award costs against the father in respect of unwarranted applications but is reluctant to do so in cases involving children.

[26] The Article 179(14) mechanism was created for cases like this. It provides a filter through which the father must bring his case. If he has an arguable application with a reasonable prospect of success he will obtain leave and that application can then go forward for hearing. If he has not got such an application then he will be refused leave.

[27] The mother made the request for this order before the Family Care Centre. The father was aware of the application and was able to put forward his case before the judge. It was an entirely proper order in all the circumstances.

Conclusion

[28] For the reasons given this appeal is dismissed.