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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

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BETWEEN:

KR

Appellant;

and

DM

Respondent.

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IN THE MATTER OF A CHILD, TODD

Noelle McGrenera QC and Una McGurk BL (instructed by Donnelly & Wall Solicitors)
for the Appellant
Suzanne Simpson QC and Gráinne Brady BL (instructed by Larkin Cassidy Solicitors)
for the Respondent
Moira Smyth QC and Sinead O'Flaherty BL (instructed by the Official Solicitor)

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KEEGAN J

This case involves arrangements in relation to a child and so anonymity has been afforded. Nothing may be published which would identify the children concerned with this case or the family. The names given to the children are not their real names.

Introduction

[1] This is an appeal from a decision of Her Honour Judge Crawford ("the judge") of 30 January 2019 in relation to a child who I will call Todd for the purposes of this judgment. His mother appeals a decision to refuse her application to live in England. Currently the mother has a Residence Order in her favour and the father has a Contact Order from previous proceedings in 2016. The father's contact is essentially once during the week on a Wednesday evening and alternate weekends and holidays. The mother has another young baby who is just over one year of age and who I will call Karl for the purposes of this judgment. The mother has also married Mr B since the separation from the father.

Background

[2] This has been set out comprehensively by the judge in her written judgment. Therefore, I will only summarise the salient points in the background to this case. The parents of Todd are both from Northern Ireland. They are unmarried parents but they had a relationship for some six years from 2009 until April 2015. The child was born in December 2010 at which stage the mother and father were cohabiting. The relationship broke down and it is apparent from the papers that both parties have varying views in relation to that. In particular, I note the mother's position that the father's behaviour was at time erratic, aggressive and abusive. Whatever the truth of that this was a separation which was not cordial and which dragged out because the father held out some hopes of reconciliation. In any event Todd was three years of age when the parties separated. At this stage the family was living in Belfast and the mother and Todd continued to live there. The father moved out of the family home but had regular contact twice a week including overnight contact. It was clear that arrangements were fractious between the parents and this led to a hiatus in September 2016 when the mother unilaterally decided to move Todd to her home town within Northern Ireland.

[3] This was clearly a premediated move which caused considerable concern to the father, but more importantly it resulted in a change of school for Todd and a change in contact arrangements. As a result of this the father obtained an ex parte Prohibited Steps Order preventing the mother from removing Todd from Northern Ireland and preventing the change of school. The change of school had already happened and so this was conceded and the Family Care Centre discharged the Prohibited Steps Order. The father appealed that decision and the matter reached the High Court and was heard by O'Hara J and resulted in a consent order of 24 October 2016 which comprised a settlement of residence and contact. I accept that at this stage the father was clearly under the impression that the mother would remain in Northern Ireland.

[4] The contact arrangements set out in the order of 2016 are comprehensive and provided for contact each week on a Wednesday and on weekends. These arrangements did not remain as agreed for various reasons. In her judgment the judge sets out a number of issues and low points during contact including events in December 2017 and January 2018 when police had to be called. Despite all of this contact has settled into a fairly regular pattern involving Wednesday nights when the father takes the child to a football club and also alternate weekends and holiday contact. Notwithstanding a regular pattern there is clearly an issue with on-going communication between the parties. This is illustrated by the father unilaterally taking the child out of school in September 2019, not informing the mother or the school and the child missing the first day of primary 5.

[5] A significant feature of this case is that the mother began a relationship with a Mr B in February 2016. Mr B is from England and this relationship resulted in

marriage in September 2018 and a child has been born of the relationship namely Karl. The mother is a qualified professional, however she has not worked for some time and she has presented various reports to the court outlining the anxiety caused by these proceedings. The father is a manager who does work. In the course of these proceedings he produced his work rotas for the benefit of the court. Both parties are currently in rented accommodation. It is clear from the evidence that both parties have family around them in Northern Ireland. The mother has parents and siblings and the father also has parents and sibling support in Northern Ireland.

[6] The nub of the case is that the mother wants to relocate to England to live as a family unit with her new husband. Her husband is self-employed and runs a business based in England. Mr B gave evidence at the lower court and it is clear from the transcript of the evidence that Mr B comes across as entirely genuine in relation to this application. The judge records the evidence that Mr B tried remote working in Northern Ireland but that was not feasible and now it appears that he has to travel to England usually from a Sunday to a Thursday. So it is in that context that the mother brings the case for relocation to England.

The Appeal

[7] During the course of reviewing this case I commented that the appeal notice was discursive and did not conform to good practice by actually isolating the issues in the case. This is a matter which I hope will be noted by family practitioners going forward. Happily, a condensed notice of appeal was filed during the course of proceedings which sets out the following grounds of challenge:

(i) That the decision of the learned judge was wrong in all the circumstances of the case; it was against the weight of evidence; and does not reflect the issues raised in evidence.

(ii) The learned judge erred in her analysis of the objective evidence from the court children's officer, and did not explain adequately, or at all, the reason for not following the recommendation of the court children's officer.

(iii) The learned judge erred in relying on the subjective evidence of the Official Solicitor who had not performed a transparent analysis of the welfare checklist, particularly given the representative role of the Official Solicitor and the imbalance brought to the case as a result.

(iv) The learned judge failed to consider the many possible alternative arrangements for contact between the respondent and child, both direct and indirect; and, erred in her analysis that the quality of contact is impacted by the quantity.

(v) The learned judge did not give sufficient consideration to the rights of the family unit (step-father, mother, son, half-sibling); and failed to fairly balance

the needs of the family with the needs of the respondent; and, failed to evaluate the impact of the subject child not ever having the benefit of traditional family life.

(vi) The learned judge erred in her finding in respect of the respondent's contradictory evidence about the flexibility of his working arrangements.

(vii) The learned judge did not afford any weight to the respondent's deception as to his living arrangements; his alleged application for Access NI clearance to coach soccer; and, his sister's living arrangements.

(viii) The learned judge failed to attach sufficient weight to the impact on the appellant of the refusal to relocate.

[8] One obvious issue with this appeal is that it has not been expeditiously progressed before the court. I raised this when I first took carriage of the case. This is of a concern to me because appeals of this nature should really be dealt with within a number of months. What happens whenever an appeal is delayed is that there is inevitably an application for fresh evidence because children's cases are not static. I have received various chronologies about the reasons for delay with each party raising issues about the other. It is not productive to apportion blame for this. But the fact of the matter is that this appeal has been unnecessarily delayed and complicated by the pursuit of satellite issues (the child making YouTube videos is one example). It was also entirely unproductive for counsel for the father and the Official Solicitor to oppose the introduction of fresh evidence. In my view fresh evidence was inevitable given the passage of time between the hearing of this case and my determination. Counsel should remember that the principles in *Ladd and Marshall* are to be read in context and in family cases they are often subject to relaxation. In this case I allowed fresh evidence by way of updated statements from both parties and they were also were permitted to file updated evidence in relation to the father's work arrangements, the mother's contact proposals and the mother's mental health assessments. I also needed to obtain an update from both parties following Covid-19.

[9] Again much ink was split in relation to the test on appeal. In this jurisdiction the issue of appeals flows from a number of cases. Appeals from the Family Care Centre are not conducted as automatic re-hearings for the reasons set out in *McG v McC* [2002] NI 283. However, that case has been subject to modification by judges sitting in the Family Division given Article 6 fair trial Convention obligations and the fluctuating nature of family life. The practice in this jurisdiction has been that a case is usually conducted by way of submissions with the judge determining whether or not oral evidence of additional statements are required.

[10] The conduct of this appeal illustrates how this approach operates in practice. I heard submissions from all counsel who utilised the transcripts in this case and made their respective submissions. After hearing from the submissions I decided

that I needed to hear some updating oral evidence from both of the parents and the court children's officer ("CCO"). This is a procedure which is adopted in many of the family appeals in this jurisdiction as will be apparent from the authorities put before this court. However, this procedure does not detract from the ultimate appellate test which is now clarified by the Supreme Court in the case of *Re B* [2013] UKSC 33.

[11] In that case the Supreme Court was quite clear that an appellate court, in referring a judge's determination, had to take into account both the advantages which he or she had enjoyed in seeing the witnesses and the parties and also the fact, in focusing on the future possibilities involved he or she would be making a value judgment, not exercising a discretion; that, accordingly, the appellate court should only intervene where it was satisfied that his or her decision was wrong. I proceed on that basis that I must decide whether or not the learned judge was wrong in her determination.

[12] The parties agreed that no point of law arises in this appeal. That is unsurprising given the fact that the learned judge meticulously recounts the law in this area in her judgment. The judge starts with the decision in *Payne and Payne* [2001] EWCA Civ 166 where Thorpe LJ reviewed the approach of the courts in relocation cases. That case attracted some controversy because of a suggested presumption in favour of a relocating parent (usually a mother). A clarification was made in subsequent jurisprudence that the guidelines in *Payne* were only guidelines and in that the true test in relation to a relocation as the welfare principle. Black LJ in *MK v CK* [2012] Fam 134 reiterated this and directed practitioners to the common sense approach that the *Payne* guidance must be heeded, but not as a rigid principle or so as to dictate a particular outcome in a sphere of law where the facts of individual cases are so infinitely variable. There was no presumption that the reasonable relocation plans of the carer will be facilitated unless there is some compelling reason to the contrary.

[13] In this jurisdiction the Court of Appeal has dealt with a number of relocation cases including *SH v RD* [2013] NICA 44. In that case the Lord Chief Justice highlighted the point that *Payne* is not of course binding in this jurisdiction, although of strong persuasive authority. He also said:

> "There is no dispute about the fact that the welfare of the child is paramount in both applications before the court and that the welfare checklist applies directly in relation to the shared residence application and as a matter of good practice in relation to the relocation application."

[14] I posed the question whether there was any difference between external and internal relocation and counsel agreed that flowing from a number of decisions including the case of *Re C (A Child)* [2015] EWCA Civ 1305 that there is no such

distinction. In that case Mr Justice Bodey set out a summary of the position as follows:

> "(a) There is no difference in basic approach as between external relocation and internal relocation. The decision in either type of case hinges ultimately on the welfare of the child.
>
> (b) The wishes, feelings and interests of the parents and the likely impact of the decision on each of them are of great importance, but in the context of evaluating and determining the welfare of the child.
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> (c) In either type of relocation case, external or internal, a Judge is likely to find helpful some or all of the considerations referred to in *Payne v Payne* [2001] 1 FLR 1052; but not as a prescriptive blueprint; rather and merely as a checklist of the sort of factors which will or may need to be weighed in the balance when determining which decision would better serve the welfare of the child."

[15] This case really comes down to whether or not the judge evaluated the relevant evidence correctly in reaching her findings. This is more than an exercise of discretion and as *Re B* illustrates the court may intervene if the judge was wrong. That said, I apply the appropriate level of caution to an examination of this nature. It is clear that the judge applied the welfare checklist and considered the evidence. But as the notice of appeal highlights the case made by the mother is that she went wrong in her assessment of the children court officer's evidence. Also, the mother maintains that the judge placed undue emphasis upon the Official Solicitors report. Finally, there is a valid argument that the judge may have gone wrong in terms of assessing the benefit the child would obtain from a settled family life against the change in the relationship with his father. These are the issues at the heart of this case.

Consideration

[16] I have looked at this case holistically in the sense that I have examined all of the papers and the transcripts. It is clear that the learned judge comprehensively looked at all of this and heard evidence as well. However, I raise some issues of concern which impact upon the decision because they clearly influenced the learned judge. The first relates to the children court officer's evidence. I was sufficiently concerned about the judge's consideration of this evidence to hear from this witness myself. In particular, I was concerned about paragraph [65] and [66] of the judge's ruling which reads as follows:

> "I find that the CCO's evidence regarding the father's relationship must be considered against the backdrop of how the CCO characterised the father's contact. In her report she described the father as having a high level of contact with Todd. She confirmed this in her evidence in chief. Under cross-examination, having agreed that Todd enjoyed the benefits of shared care between his parents, a short time later the CCO stated: 'When I studied it I am not sure it is a high level of contact. I am not sure that I would use high again'. There was no rationale advanced as to why in the course of evidence she suddenly changed her mind. At various stages she referenced the changes that the contact had undergone since the parties separated and expressed the view that as the relationship is still significant despite those changes it would similarly be maintained upon a relocation.
>
> [66] I am concerned by this change in the CCO's evidence whereby she diminished the level of the father's contact. I find that it is reflective of the general tenor of her evidence regarding the father's contact and relationship with Todd. I consider that the CCO did not place sufficient weight on the importance of maintaining the quality of Todd's relationship with his father in her assessment of the proposal."

[17] Having reviewed the evidence and indeed the report of the CCO I cannot agree with the judge that the CCO underestimated the father's relationship with the child. In fact I take the opposite view by virtue of the CCO report and the evidence that she gave to me. It seems to me that the judge has also over-estimated the quantity of contact over the quality of contact. The CCO's written and oral evidence is quite clear that the father has a very good relationship with the child.

[18] It is important to consider what the CCO was actually saying in this case. To do that it is best to look at her report in total but in particular paragraph 7.11. That paragraph reads as follows:

> "I would suggest to the court that the relocation application has at its core a desire, an intention to offer and support Todd with a good quality of life in England whilst supporting his relationships in NI with particular attention to the relationship with his father. If the court concludes from the evidence available to it that the evidence does not suggest this

> move would be detrimental to Todd's well-being having given genuine consideration to the welfare checklist, then I would respectfully recommend that as there is no imminent move forecast, the parties engage in formal mediation as a way to agree a comprehensive parenting plan which defines expectations and responsibilities of the parents in terms of contacting each other regarding issues of importance around key areas of direct and indirect contact, holiday contact periods and arrangements, communication, which demonstrates a working ability to support one another to place Todd's needs for consistency at the heart of all of their interactions. With this in place the court could determine with greater ability the commitment of each of the parties to ensure the proposals being made are workable and transferable to England."

[19] During the course of submissions Ms McGrenera effectively highlighted very many references in the CCO's evidence that relocation would be in the best interests of this child from the point of view of having a family life, the child having experienced separated parents from an early age. This is powerful evidence which in my view has been overlooked in the judge's assessment of welfare or it did not receive the attention it deserved. But in any event the CCO's point at paragraph 7.11 is well made in terms of a recommendation. I have satisfied myself that the CCO was a credible witness by hearing from her myself. I did this in the context of counsel raising potential issues of inexperience. Those submissions were entirely misplaced. This CCO is a very experienced practitioner, she may not have dealt with other relocation cases, but she clearly understands children, their needs, and how to build on relationships. I found her a persuasive and thoughtful witness. I was impressed that despite her busy day she took an interest in this case and wanted to stay to hear all of the evidence and to assist the court as best she could. So I consider the criticisms made of her by counsel were not of value and I also consider that the judge has erred in her assessment of the CCO's evidence. There is some good sense in what the CCO was saying because it was actually a provisional recommendation. She thought that it was in Todd's best interests to relocate because of the family life he would experience. But she thought that the parties should enter into mediation to improve communication and to settle better contact arrangements before that could happen.

[20] Another area of concern for me relates to the Official Solicitor. I preface my comments by recording that in cases of this nature the Official Solicitor performs a very important role in representing the interests of children. Also, if a recommendation is made the Official Solicitor may be questioned as happened in this case. Such an approach was approved by the Court of Appeal in *Fergus v Marcail* [2017] NICA 71 and it accords with the Article 6 rights of all involved.

[21] I accept the submissions of Ms McGrenera that the judge relied heavily on the Official Solicitor's recommendation which was against relocation. This is obvious as the judge sets out the Official Solicitor's view in her judgment in some detail. However, with characteristic candour, the Official Solicitor recognised her limitations when giving evidence. She had not spoken to Todd. She did not specifically consider the welfare checklist and as she said herself she is not a social work expert. The judge heard extensive questioning and submissions on behalf of the Official Solicitor which undoubtedly influenced her. In this context, I consider that the judge placed undue reliance upon the recommendation.

Conclusion and disposal

[22] In light of the above there is sufficient material for me to conclude that the judge was wrong in her assessment of the evidence from both the CCO and the Official Solicitor. I also consider that the judge, through no fault of her own, did not have complete evidence about contact arrangements and practicalities to make a fully informed decision on relocation. Therefore, I cannot be satisfied that the judge's refusal of a Specific Issue Order is correct. However, that is not the end of the matter as I must decide how to dispose of the case given the range of options open to me as an appellate judge.

[23] The problem in this case is that time has moved on again even since the appeal hearing. I asked the parties for updated statements about arrangements during Covid-19. From reading these statements it is unsurprising that the pandemic has had an impact. I note changes in accommodation for the father. I have not had an updated statement from Mr B which would explain working arrangements in the current climate. There are factual disputes between the parties on certain issues. Also, it is of significance that the CCO's assessment is now well out of date.

[24] All of this means that unfortunately I am not in a position to finalise the case at this time. The fairest course is to have a further hearing with an updated welfare assessment. I am convinced that this is the right course given the nature of relocation cases which are often finely balanced and the need to closely examine practical arrangements. I appreciate that the lack of certainty will put a further strain on the family but I think the time can be used purposively to discuss all issues. In my view both parties have displayed an element of immaturity and a lack of respect towards each other in relation to contact arrangements in the past. I hope that this has improved and that trust can be rebuilt. The parties may also wish to reflect on the original welfare recommendation for mediation which may assist. I will hear from counsel as to the directions that are required. There is liberty to apply.