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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 08 /04/2022

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

X

Appellant

and

Y

Respondent

Appellant appeared as a Litigant in Person
Melanie Rice BL (instructed by Thompson Crooks Solicitors) for the Respondent

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QUINLIVAN J

Introduction

[1] The parties in this case have been anonymised in order to protect the identities of the children who are the subject-matter of these proceedings. The children must not be identified either directly or indirectly in relation to these proceedings.

[2] This is an appeal by the appellant father from the decision of HHJ Kinney. The case before Judge Kinney concerned three children, the oldest of whom was 16½ at the time of the judgment and the younger children who were aged 14 and 11.

[3] Prior to HHJ Kinney's decision, the appellant father had a residence order in his favour and the mother had contact. The mother was seeking a joint residence order and increased contact. On her proposals the children would spend approximately half of their time with the mother and half with the father.

[4] HHJ Kinney made a joint residence order. He made no contact order in relation to the eldest child in view of his age. He increased the mother's contact with

the younger children. The Judge ordered that in Week One the two younger children would reside with their mother from Friday after school until returning to school on Monday and on Week Two from Wednesday after school until Saturday at 10 am. This represented an increase in the mother's level of contact, albeit contact was not as generous as that which the mother had sought, and the judge's order reflected the views of the social worker.

[5] Contact arrangements were also put in place over the holiday period and taking into consideration significant dates such as Mother's Day, Father's Day and the parents' birthdays. As I understand the appellant's case no issue is taken with the contact order as it relates to holiday periods. His primary objection is to the contact arrangements put in place during the school term.

[6] As observed by HHJ Kinney the children have been the subject of court proceedings over several years since the breakdown of their parents' marriage. This case has had a lengthy and acrimonious background.

Legal Framework

[7] During the course of the hearing the appellant father repeatedly sought to challenge the findings of fact arrived at by HHJ Kinney. In particular he was extremely critical of the social worker in this case and invited this court to essentially reject her evidence, a conclusion which would have amounted to overturning HHJ Kinney's acceptance of her evidence.

[8] It is considered appropriate in the circumstances to outline the court's approach to the appellant's appeal, because many of the appellant's grounds of appeal, amounted to challenges to findings of fact arrived at by the trial judge.

[9] Article 166(1) of the Children (Northern Ireland) Order 1995 ('the 1995 Order') provides that an appeal shall lie to the High Court against the making by a County Court of an order, under the 1995 Order, or the refusal of the County Court to make an order.

[10] The 1995 Order is silent as to the manner in which an appeal should be considered and heard. However the approach whereby an appellate court should proceed in such a case was outlined by the House of Lords in its judgment **G v G** [1985] FLR 894. Lord Fraser, who gave the leading judgment, stated:

> "I entirely reject the contention that appeals in custody cases, or in other cases concerning the welfare of children, are subject to special rules of their own. The jurisdiction in such cases is one of great difficulty, as every judge who has had to exercise it must be aware. The main reason is that in most of these cases there is no right answer. All practicable answers are to some extent wrong, and the

> best that can be done is to find an answer that is reasonably satisfactory. It is comparatively seldom that the Court of Appeal, even if it would itself have preferred a different answer, can say that the judge's decision was wrong, and unless it can say so, it will leave his decision undisturbed."

[11] In *McG v McC* [2002] NIFam 10 Gillen J approved the principles established in *G v G* namely that the High Court will not interfere unless the decision was plainly wrong or the trial judge erred in principle. The **G v G** approach was confirmed by the Northern Ireland Court of Appeal case of **SH v RD** [2013] NICA 44. In a judgment of the Supreme Court, in **Re B** [2013] 1 WLR 1911, the Supreme Court ruled that it was not required that the appellate court concluded that the judge was 'plainly wrong' but simply that the judge was 'wrong'.

[12] Thus it is simply not enough for the High Court to conclude that the lower court made an error in the balancing exercise, rather it is clear from the authorities it is for the appellant, to show this court on the balance of probabilities that the lower court was wrong to make an order for joint residence and wrong to give the mother the level of contact which the court ordered, or alternatively that the trial judge had erred in principle.

[13] As to the mode of hearing O'Hara J stated in **N's (A Minor) Application (Relocation Appeal)** [2015] NI Fam 12:

> "Appeals from the Family Care Centre are conducted on a confined basis for the reasons set out by Gillen J in *McG v McC* [2002] NI 283. What typically happens is that written submissions are presented. If it appears from those submissions that there are issues which need to be explored further that can be done by way of oral evidence of additional statements or reports being filed."

[14] This case proceeded on the basis of written and oral submissions from the appellant father and counsel on behalf of the respondent mother.

Appellant's appeal

[15] In his appeal the appellant sought the following:

(1) A prohibited steps order preventing Y from taking the children to the matrimonial home should remain in place.

(2) A contact order to reflect that previously made in the High Court in 2017. He considered that the contact order granted by HHJ Kinney caused instability in

the children's life after 5 and a half years of having had a fixed routine, he also considered that the children's wishes and feelings should have been ascertained in relation to contact.

(3) A residence order granted by the High Court in 2017 should remain in his favour and a joint residence order should not be granted. He indicated that in his view the respondent mother had always been involved in decision making in relation to the children even in the absence of a residence order.

[16] I will briefly address the issue of the prohibited steps order, which was not a significant feature in the case before me. The respondent mother maintained that no such order was sought in the court below. The matter does not feature in the Trial Judge's judgment and in reality, other than outlining this as an application at the outset of his submissions, this issue did not feature before me. In the circumstances it is not proposed to make any such order.

[17] As noted above, the trial judge, in arriving at his decision as to the level of contact to be awarded to the respondent mother, relied on the recommendations of the social worker. Those recommendations gave more generous contact to the respondent mother than the contact order which the appellant wished to have in place, but also gave the mother less generous contact than that she had sought. As appears from the judgment, HHJ Kinney heard from both the appellant father, the respondent mother and the social worker, and the appellant father had an opportunity to challenge the social worker's evidence, both by way of cross-examination and by giving evidence on his own behalf.

[18] When evaluating the appellant's appeal, it is apparent that he invites this court to displace the judge's assessment of the witnesses he heard from, including in particular, the judge's assessment of the social worker and his assessment of the appellant father. For the reasons outlined above the approach to appeals from decisions of the County Court is not by way of a full re-hearing and it would not be appropriate for the High Court to displace the judgment of the County Court judge as to his assessment of the witnesses, in circumstances where evidence was not received and unless the appellant father could persuade this court that the trial judge erred in principle, or was wrong.

[19] In that context it is proposed to address the appellant father's submissions to this court.

[20] The appellant argued that the social worker had erred in her approach to contact and that the trial judge had similarly erred in circumstances where the social worker formed the view that the mother could have more generous contact in the school term against a backdrop of increased contact having worked well over the holidays. The appellant's submission was essentially that the equation of contact over the summer with contact over the school year was inapt given that the circumstances of contact over the summer did not make the same demands on

parents as it would during the school year when issues around having the correct books and equipment would arise.

[21] His submission was essentially that the judge had erred in equating the two and relying on the social worker's evidence on this issue as a basis for extending contact.

[22] I do not consider that the judge was either wrong or that he erred in principle, in adopting the approach he did. HHJ Kinney had the advantage of hearing evidence from the social worker and assessing her evidence. Having regard to how the children were engaging in contact with the mother over the course of the summer was also a legitimate basis for considering whether more generous contact could be put in place, including during the school year. It seems to me that the approach taken by the judge could not be criticised as either wrong or as an error in principle and this ground of appeal is rejected.

[23] A significant ground of complaint on the part of the appellant father was his complaint that the children's wishes and feelings were not expressly sought, in the sense that the social worker did not sit down with the children and seek their views about extended contact and the trial judge rejected an application that he should speak with the children. There are a number of aspects to his complaint about the failure to ascertain the children's wishes and feelings which I propose to address together. Thus, he complains:

(i) Firstly, that the social worker did not sit down with the children and seek their views on the variation in contact.

(ii) He further complains that the social worker only spoke to the children in the presence of their mother and did not speak to the children on their own.

(iii) Finally, he is critical of the judge's refusal to meet the children, contrasting that with the decision of a previous Judge, HHJ Loughran to meet with the children.

[24] It appears to me that these are all different aspects of an over-arching complaint that the trial judge failed to have regard to the children's wishes and feelings as he was required to do.

[25] It is clear that the social worker formed the view that the appellant father was seeking to influence the children in relation to the levels of contact they should have with their mother. As outlined further below, she concluded that the appellant father was interviewing the children after contact with their mother, an aspect of her evidence the appellant father also invited the court to reject. She gave evidence that she considered that she had a good relationship and rapport with the children. She also gave evidence that she had formed the view that requiring the children to

attend court to outline their views on contact would have a negative impact upon them. This was the evidence of the social worker, and that evidence was accepted by the trial judge. It seems to me that the appellant father is again seeking to displace a finding of fact arrived at by the trial judge who considered the totality of the evidence, which included the social worker being questioned by the appellant father. I see no basis for concluding that the trial judge fell into error in his approach to this issue and I am satisfied that the children's wishes and feelings were appropriately taken into account in a manner designed to protect their welfare.

[26] The appellant father was critical of the social worker's evidence to the effect that the social worker had formed the view that the appellant father was interviewing the children after contact with their mother. The appellant father contrasted the findings of the social worker with the approach taken by previous social workers who had concluded that the children's wishes and feelings were not being adversely impacted by the father. Again, it appears to me that this is simply an example of the appellant father seeking to displace the trial judge's assessment of the social worker. Again, I see no basis for concluding that the trial judge fell into error in his approach to this issue.

[27] The appellant father was critical of the trial judge's decisions in relation to mediation process which the parents commenced as follows:

(i) He considered that the judge had been wrong to receive evidence about the mediation and contended that evidence about the mediation should not have been considered by the court.

(ii) He also challenged the judge's conclusion that he had declined to permit the children to speak to the mediators, contending that in fact he had merely sought to delay any contact between the mediators and the children until various exams which they were undertaking had been completed.

[28] On the issue of mediation the trial judge noted that the issue of mediation had been before the court on a number of occasions and had been encouraged by the court. He further noted that the appellant father had expressly consented to going into mediation and this course was approved by the trial judge. His assessment of the appellant father was that he had given variously contradictory accounts of why it was that the mediators were unable to speak to the children. I conclude that the judge was not wrong to receive evidence about the mediation and did not err in his approach on this issue. He was also entitled to reach the conclusion he reached about the father not consenting to the children speaking to the mediators.

[29] The judge also made a finding in relation to the appellant father's non-engagement with a Consultant Family Therapist. The therapist concluded that, the children were not free to express their true wishes and feelings and that the appellant father was seeking to alienate the children from their mother. Ultimately,

she concluded that there was parental alienation. She also observed that despite the appellant father having agreed to undertake family therapy and despite her having received a joint letter of instruction the appellant father then declined to attend further sessions with her after the initial meeting. The appellant father maintains that his sole reason for non-engagement was financial. The trial judge concluded when the appellant feels threatened by professionals who are seeking to move contact on he simply disengages. Again, I am satisfied that this was a conclusion he was entitled to arrive at on the evidence before him.

[30] The appellant father criticised the judge's conclusion that the respondent mother had been marginalised in relation to decisions made, particularly around schooling. Having heard the submissions from the appellant father on this issue, it is apparent that the appellant father struggled to acknowledge that the respondent mother was entitled to have an appropriate level of input into decisions around the children's education. He regarded many of the decisions as being either; the sole preserve of the children; or decisions which were inevitable and thus her input was ultimately unnecessary. Even over the course of his submissions to this court, he struggled to recognise the need for the respondent mother to be able to engage fully with decision-making around the issue of the children's education. In view of his approach to this issue before this court I see no basis for interfering with the trial judge's findings of fact on this issue.

[31] The appellant father was critical of the trial judge's determination that the appellant father was unable to forget the past and to put behind him the difficulties which had existed between the respondent mother and the children and to move forward. However, over the course of the hearing before me, it was apparent that the appellant father appeared unable to acknowledge that changes have taken place in the children's relationship with their mother which are relevant to the level of contact she should have with them. The trial judge's assessment of the appellant father was mirrored by this court's experience of his presentation. Ultimately, however, while HHJ Kinney did conclude that the appellant father was unable to forget the past, it did not appear to me, reading his judgment, that his assessment of the father on that issue was a significant factor in his decision-making. Rather the judge relied on the views of the social worker, which he was entitled to do.

[32] Finally, there was a dispute about the circumstances in which one of the children left her trainers behind when the children were moving between contact. I clearly indicated to the appellant father that this was an issue of insignificance in the case before the court and would not influence the court's decision one way or another. Despite that the appellant father continued to ventilate his concerns around this issue. For the avoidance of doubt, I did not regard the issue as of significance, it simply reflected the practical difficulties which sometimes arise when children are moving between parents.

[33] For the aforementioned reasons the appellant's appeal is rejected. I should say I recognise that the appellant father is clearly devoted to his children, he is

motivated by his concerns about their welfare and he seeks to protect what he sees as their best interests. However, while recognising his desire to protect his children, I am unable to conclude that the trial judge was wrong in his decision to make a joint residence order or to grant the mother more generous contact than she previously had. The order of the trial judge is upheld.