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Judgment: approved by the court for handing down (subject to editorial corrections)*	*Delivered:*	**28/10/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

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Between:

A GRANDMOTHER

Appellant

-v-

A MOTHER

and

A FATHER

Respondents

IN THE MATTER OF MA (A MALE CHILD AGED 9 YEARS)

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Ms J Gilkenson BL (instructed by SRM Legal solicitors) for the Grandmother
Ms L Brown BL (instructed by Kelly Corr solicitors) for the Mother
The father did not appear

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McFARLAND J

Introduction

[1] This is an appeal by the grandmother against a decision of Her Honour Judge McCaffrey ("Judge McCaffrey") on 23 June 2022 at Londonderry Family Care Centre. The grandmother's application for a defined contact order in respect of her grandson, who I will call MA, was dismissed without prejudice.

[2] This ruling has been anonymised to protect the identity of the child. I have used the cipher MA for the child. These are not his initials. Nothing can be published that would identify MA without leave of the court.

Background

[3] MA is the child of the mother and the father, who is the son of the grandmother. He is approaching his 10th birthday. The parents separated in November 2014 when he was one year old. Domestic violence perpetrated by the father on the mother was a feature of the relationship, with a conviction for an assault committed in December 2013 and another for an assault committed in June 2015.

[4] The father commenced a relationship in February 2017 with another woman moving in to live with her in the summer of 2017. She had a child in March 2014 who I will call RE, and another child was born before the father moved in to live with her. He was not the father of either child, although a child was born to him by another woman in April 2017.

[5] The relevance of the father's other relationships is that following incidents on 15 August 2017 and then 16/17 September 2017, the father was convicted of child cruelty in respect of a facial injury to RE and the manslaughter of RE. The convictions followed a trial at Londonderry Crown Court before His Honour Judge Babington and a jury. The father's explanation that the facial injury was caused by the child dropping a small toy on himself was clearly rejected by the jury. The father offered no explanation as to how RE suffered multiple injuries whilst in his sole care. These injuries were summarised by the pathologist as follows:

> "Thus, in summary this young boy had sustained a large number of bruises caused by blunt force trauma to his face and head undoubtedly as a result of non-accidental injury. As a result of the blows to the head there had been bleeding over the surface of the brain which had also become swollen. It was the effects of the head injury which were the cause of his death."

When the pathologist referred to "a large number of bruises" he was referring to approximately 30 bruise sites to the head.

[6] The father had originally been charged with the murder of RE but was acquitted during the trial at the direction of the judge.

[7] The father subsequently sought leave to appeal the convictions which was refused by O'Hara J. He renewed his application for leave to appeal before the full court (Keegan LCJ, Maguire LJ and me) and this application was refused. Leave to appeal the total sentence of 15 years was also refused.

[8] These events had a significant impact on the relationships between the mother and the father and the mother and the grandmother, not least because the mother gave evidence for the prosecution at the trial in relation to the assaults she

suffered at the hands of the father, which had been admitted as bad character evidence.

[9] Contact between MA and the grandmother had been taking place up to September 2017 which was the time of the father's initial arrest. Subsequent to that there were two further contact sessions at Christmas 2017 and then in March 2018 (when MA was six years old) and contact then stopped. The father has not seen MA since mid 2017.

The grandmother's application and Judge McCaffrey's decision

[10] After the father's conviction in December 2019, the grandmother brought her application for leave to seek a contact order in January 2020, and this was subsequently granted with the application then being made on 10 November 2020.

[11] After the filing of statements of evidence (two by the grandmother and one by the mother) a court children's officer report was directed, but because of extreme pressure on that service, as an alternative, a report was directed from an independent social worker. There were delays associated with the production of this report. It was filed on 20 June 2022, the morning of a review hearing.

[12] At the request of the solicitors for both parties there was a short adjournment to 23 June 2022 to allow both to study the report and take instructions from their clients.

[13] The court then conducted a further review hearing on 23 June 2022. At that hearing the grandmother's solicitor applied for a further adjournment into early July as she had not "been able to get full instructions." No further detail was offered to Judge McCaffrey who expressed her concern in the following terms – "Frankly I would have thought that if your client was that concerned about it she would have made sure to answer your phone calls and respond." I sought further clarification as to what communication there had been between the solicitor and the grandmother during the 20–23 June 2022 period and was advised that there was a telephone conversation on 22 June 2022 when the report was briefly discussed and the solicitor noted that she needed "to get her in for an hour." No further detail was given about whether such a meeting had ever been arranged. In any event, this conversation was not relayed to Judge McCaffrey and no explanation was given to me as to why it had not been.

[14] The crucial issue in this case is the grandmother's attitude towards her son and her belief that he is innocent of the assault and manslaughter of RE. This has been a consistent theme throughout this period, and the independent social worker referred to it as still a current issue. Judge McCaffrey raised it with the grandmother's solicitor on several occasions during the review hearing.

[15] Judge McCaffrey then made reference to some of the content of the report

from the independent social worker. The report had given a clear indication about the work that needed to be done by both the mother and the grandmother. Judge McCaffrey added that "there would have to be an acknowledgment from the grandmother of the reality of the situation and there would have to be a lot of trust rebuilt."

[16] Judge McCaffrey concluded those remarks in the following terms:

> "So, I do not think it is helpful for this court to make any order at the moment or to prolong the matter."

The applications were then dismissed on a without prejudice basis.

The Appeal

[17] The main thrust of the appeal is that the grandmother was denied a fair hearing in that Judge McCaffrey failed to give the grandmother adequate time to respond to the independent social worker's report, dismissed the application at what was a review hearing and without hearing from the grandmother and allowing her to test the evidence of the mother and the independent social worker.

The law governing family appeals

[18] The now well established principle in respect of appeals in family cases is that the appellate court should carry out a review of the lower court's decision and not a re-hearing of the case. The test to be applied is whether the lower court either erred in law or was wrong (see *Re B* [2013] UKSC 33).

[19] In *Fergus v Marcail* [2017] NICA 71 the father complained that he had been denied the opportunity by the first instance judge to cross-examine the mother, a social worker and the Official Solicitor. The judgment of Gillen LJ gives some useful guidance. After an extensive review of the case law he set out some observations which bear repeating –

> "[32] In short these are not ordinary civil proceedings. Family proceedings present a situation where it is fundamental that judges have an inquisitorial role, their duty being to further the welfare of the children which, by statute, is paramount. Hence judges exercising the family jurisdiction have a much broader discretion than they would have in the civil jurisdiction to determine the way in which an application is being pursued.
>
> [33] Thus there are cases in which the judge, bearing the interests of the child at the forefront of the judicial mind and where litigation has perhaps been on-going for

> a very long time, will feel compelled to act on rather less evidence and argument or rather more urgently than otherwise would be the situation.
>
> [34] The approach of the European Court of Human Rights reflects a similar latitude in such cases dealing with Article 6 of the European Convention on Human Rights and Fundamental Freedoms. Everyone is entitled to a fair and public hearing in the determination of his civil rights and obligations or of any criminal charge against him, but the requirements inherent in the concept of "fair hearing" are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge. Contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases (see *Dombo, Veheer VV v Netherlands* [1993] ECHR 14448/88 at [32]).
>
> [35] Equally however, courts must be wary of taking an over robust attitude in the particular circumstances of any given case. The presumption still should be that if evidence is filed which is controversial, the party who challenges that evidence should have the right to cross-examine the witness. If no evidence is called, the court is unlikely to be able to decide issues of fact 'on paper.'"

[20] I have been referred to one English example (*Re B* [1997] 2 FLR 579) where the Court of Appeal refused to allow an appeal after the court below dismissed a father's application at a review hearing. Lord Wolff MR at 586E said that the court's powers were extensive and later at 587H stated that "we unhesitatingly conclude that there was no error in principle in summarily dismissing the father's application for contact on the appointment for directions."

Consideration

[21] At the hearing on 23 June 2022 Judge McCaffery was not told about the contact that had taken place between the grandmother and her solicitor the day before. She was only told that the grandmother had not given full instructions after the receipt of the independent social worker's report. The only conclusion I can make is that the reason for this was tactical rather than an oversight by the solicitor.

[22] There was already extensive evidence (in the form of three witness statements) and the report before the court. To some extent very little of this

evidence was particularly controversial. The evidence displayed a significant difference of approach between the mother and the grandmother. By June 2022 the case had been before the court for over two years. The report had identified the key issue and this was not anything new. It was the core issue that had bedevilled the relationship between the grandmother and the mother since 2017. The grandmother did not accept the fact that her son had killed RE and by June 2022 her view had not changed.

[23] Even by the time of the hearing before me her view had not changed. Her counsel had not been instructed to make an unequivocal statement of acknowledgment by the grandmother of the fact that her son killed RE. The grandmother has stated that she accepts the verdict of the jury. This is not a significant concession. The jury verdict is a fact, and no one could really contest it. The real issue is whether the grandmother accepts that her son killed RE. She does not. Judge McCaffrey was fully cognisant of this fundamental issue and correctly, as it has turned out, had significant doubts about the ability of the grandmother to modify her thinking.

[24] This is the core issue in relation to any future relationship with her grandson. There are obvious welfare issues for MA, including safeguarding issues, issues concerning developing a narrative for MA, how contact can be commenced and maintained but fundamentally there is an issue of the lack of trust between the mother and the grandmother.

[25] The evidence points to the grandmother prioritising her relationship with her son over the relationship with her grandson.

[26] All this evidence was available to Judge McCaffrey on 23 June 2022 when she was conducting the review hearing. The case had been previously adjourned for the express purpose of the grandmother giving full instructions to her solicitor. Nothing was reported back to the judge about those instructions, with just a further request for an adjournment.

[27] Article 3 of the Children (NI) Order 1995 not only provides that the welfare of the child is the paramount consideration but also includes two important provisions at (2) and (5):

> "(2) In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child."
>
> "(5) Where a court is considering whether or not to make one or more orders under this order with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the

child than making no order at all."

[28] The first comment that Judge McCaffrey made at the hearing related to the delay, so that was clearly part of her approach. She had obviously read the independent social worker's report and had identified the continuing problem in the case. Nothing was going to change whether the grandmother did in fact speak to her solicitor, attend an adjourned hearing to give evidence and to challenge other evidence. Even now, when the grandmother has had ample opportunity to consider the report and speak to her lawyers, there is not the essential ingredient that will break the log-jam in the case.

[29] In all the circumstances the choices facing Judge McCaffery were further delay, no real change in the attitude of the grandmother, and no likelihood of any change in the near future. Further hearings were likely to be futile. This was not a case which required the judge to have the credibility of the mother or grandmother or the opinion of the independent social worker tested by cross-examination.

[30] Struggling along with the case management of this case on the off chance of a genuine change of heart was never going to be in MA's interest.

[31] The terms of the order, that it be dismissed without prejudice, are important. Judge McCaffrey was not dismissing the grandmother's case on the merits but she was basically telling the grandmother to reflect on her position and to return to court, if necessary, when she was in a position to prioritise the interests of MA above those of her own son. She also encouraged the parties to undertake the mediation suggested by the independent social worker.

Conclusion

[32] In the circumstances I do not consider that it could be said that Judge McCaffrey's decision was wrong. It was a decision within her discretion and in making it she carried out an appropriate balancing exercise which had the welfare of MA at its heart.

[33] I therefore dismiss the grandmother's appeal. I will hear the parties in respect of costs.