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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

Between:

A HEALTH AND SOCIAL CARE TRUST

Applicant/Respondent

-v-

A MOTHER

Respondent

-and-

A PATERNAL GRANDMOTHER

Appellant

IN THE MATTER OF AR (A MALE CHILD AGED 22 MONTHS)

Ms P McKernan BL (instructed by the Directorate of Legal Services) for the Health and Social Care Trust

**Ms S Jones BL (instructed by Gerard Maguire solicitor) for the Mother
M S Simpson QC and Ms K Downey BL (instructed by McIvor Farrell solicitors) for the paternal grandmother**

Ms K Hughes BL (instructed by Walker McDonald solicitors) for the Guardian ad Litem representing the interests of the child

McFARLAND J

Introduction

[1] This is an appeal from a decision made by Her Honour Judge Bagnall (“Judge Bagnall”) at Craigavon Family Care Centre on 26 February 2022 to refuse the grandmother leave to be joined as a party to the proceedings. The notice of appeal also purported to appeal against the substantive decision to grant a care order with a

care plan for adoption and a freeing order to free the child for adoption, but as the grandmother is not a party to those proceedings she has no standing and cannot appeal that decision. However, should she succeed in her appeal on the joinder issue, the court could review the position in relation to those orders.

[2] I have used the cipher AR for the child and have anonymised this judgment to protect the identity of the child.

Background

[3] AR's father died prior to his birth and was not named on the birth certificate. A DNA test determined his parenthood in January 2021.

[4] AR was removed from his mother's care on birth and was placed with his current foster carers and the intended adoptive parents. There have been longstanding issues with regard to the mother. It is not necessary to set these out in this judgment but threshold for intervention was clearly passed at the time of AR's birth, and nothing would appear to have improved in the mother's presentation since then.

[5] The grandmother had put herself forward as a potential carer for AR and was initially assessed by the Trust in March 2021. Following the assessment, further investigations continued and this resulted in the rejection of the grandmother as a potential carer at a Trust planning meeting held on 13 July 2021. This recommendation was ratified at a Looked After Children's review of arrangements on 5 August 2021. The grandmother was advised as to this outcome.

[6] The substantive consolidated hearing took place nearly six months later on 26 January 2022 and just as that hearing was coming to a conclusion, a solicitor for the grandmother attended remotely to indicate to the court that the grandmother wished to be joined as a party to the proceedings. At that stage there had been no formal application before the court. Judge Bagnall reserved judgment in the case and in the interim a C2 was lodged by the grandmother on 2 February 2022

[7] Judge Bagnall after consideration of the C2 delivered two judgments on 8 February 2022 dealing firstly with the grandmother's application for leave which she rejected and secondly with the consolidated applications for a care order and a freeing order both of which she granted.

The law relating to appeals and joinder

[8] The law is very well established in relation to how an appellate court should deal with an appeal from a lower court. There is a wide discretion vested in the lower court and decisions should not be interfered with unless they are plainly wrong. This is particularly the case when dealing with an application to join a party, which is a case-management decision (see *Re CB* [1993] 1 FLR 920, *Re B* [2013] UKSC 33, *McG v McC* [2002] NIFam 10, *SH v RD* [2013] NICA 44 and *ML v MO* [2020]

NIFam 25).

[9] Article 10(9) sets out factors to be taken into account for applications such as this:

“Where the person applying for leave to make an application for an Article 8 Order is not the child concerned, the court shall, in deciding whether or not to grant leave, have particular regard to –

- a) the nature of the proposed application for the Article 8 order;
- b) the applicant’s connection with the child;
- c) any risk there might be of that proposed application disrupting the child’s life to such an extent that he would be harmed by it; and
- d) where the child is being looked after by an authority –
 - (i) the plans for the child’s future; and
 - (ii) the wishes and feelings of the child’s parents.”

[10] Black LJ in *Re B* [2012] EWCA Civ 737 at [39] gave some guidance as to how a court should apply this provision:

“It can be seen that [Article] 10(9) does not contain anything in the nature of a test by which an application should be judged nor even criteria which must be satisfied before leave can be given nor is anything of the kind to be derived from the rest of [Article] 10. Neither does the subsection circumscribe the factors that can be taken into account in determining the leave application; it leaves the court to take into account all the material features of a case and merely highlights certain matters which are of particular relevance.”

[11] Black LJ then referred to two potentially conflicting Court of Appeal cases, both, like this case, involving a grandmother’s application for leave. In *Re M* [1995] 2 FLR 86 Ward LJ stated that that an application for leave should be dismissed if it failed to disclose that there is an “eventual real prospect of success.” In a later case Thorpe LJ in *Re J* [2003] 1 FLR 114 at [18] expressed concern about the development of a practice that substituted 'has the applicant satisfied the court that he or she has a

good arguable case' for the test that Parliament applied in [Article] 10(9).

[12] At [59] Black LJ did appear to place some restrictions of a full application of Thorpe LJ's remarks. She agreed with his comments earlier in *Re J* that grandparents had much to offer and their role should not be dismissed "without full enquiry", however observed that:

"I do not think, therefore, that what Thorpe LJ said should properly be interpreted as a requirement that any grandparent who wishes to put forward proposals should be joined as a party to existing care proceedings or given leave to issue a section 8 application or still less permitted to air their case at a full hearing on evidence. Sometimes some or all of these things will be appropriate, sometimes none and it is for the judge to weigh the various factors and decide what the proper order is in the individual case. This court is slow to interfere with discretionary decisions of this kind."

[13] Before leaving this brief analysis of the law relating to joinder it is worthwhile to note the Court of Appeal decision in *Re B-A* [2011] EWCA Civ 1643 and another judgment delivered by Thorpe LJ. The case is not dissimilar to this case. A maternal grandmother had belatedly and unsuccessfully applied to be joined as a party to the proceedings. Her appeal was allowed. There were three grandchildren, and the care plan was permanence away from the parents, with the oldest two outside the family and the youngest going to live with the paternal grandmother in Ghana. The grandmother, unlike this case, had had significant caring responsibilities for the children but not in the 18 months up to the hearing. Thorpe LJ at [24] emphasised that the previous caring role was significant as was the real prospect of generous contact with the oldest children. He stated that the case "had pretty solid foundation considering the large part she had played in their early life." The delay on the part of the grandmother was also not particularly long. Having been rejected by the local authority assessment in late June and advised by letter (which she claimed not to have received), she had to return to Ghana for the month of August due to her mother's death, and she eventually applied to be joined in mid-September. In addition she was illiterate, and she had poor English.

The appeal

[14] One significant factor is the delay of the grandmother in bringing the application. She was aware that she had failed the assessment by 8 June 2021 and had indicated to social workers that she had involved a solicitor. There is a reference in a minute of a meeting of 30 March 2021 that the grandmother had instructed a solicitor who 'is ready to go and already has a case built up.' Formal decision making concluded by early August and at the beginning of September 2021 the grandmother's solicitors wrote to the Departmental Legal Service ("DLS") indicating an interest on the part of the grandmother to be joined as a party to the proceedings.

The case was listed for review in October and hearing in January. The grandmother and her solicitor were aware of both dates. There was no appearance at the review hearing and no other contact by the grandmother or the solicitor.

[15] The excuse offered to this court was that the grandmother had neglected to provide the solicitors with financial information to complete her legal aid application. The solicitor had written letters to the grandmother and had left voicemail messages on the grandmother's telephone. No explanation was given as to what prompted the solicitor to appear at the hearing on 24 January 2022.

[16] The grandmother states that she caught the Covid-19 virus on 18 November 2021 and had spent a period of time in intensive care before discharge from hospital on 11 December 2021. She claims to be suffering from 'long-covid.' Apart from this period of approximately one month no explanation has been given as to why the grandmother had neglected to respond to her solicitor's requests for the information and why she took no proactive steps in connection with her grandson's future over this period. The information sought was modest in nature and would have taken a motivated person very little time to provide it.

[17] The grandmother took one week following the direction from Judge Bagnall to lodge her C2 but made no mention of any excuse or reason for the delay.

[18] The grandmother's case is based around what she says is an incomplete assessment by the Trust. The report of March 2021 was an 'outline assessment' and due to complexities involved in the case it recommended both a psychological assessment and an 'attachment style interview.' Neither of these were offered or undertaken. When this is coupled with the Trust's earlier decision to allow her to care for her then eight year old granddaughter, her argument is that the ultimate decision of Judge Bagnall to approve the adoption care plan on the basis of the well-known test of 'nothing else will do' could not stand given this inappropriate rejection of the grandmother as a potential kinship carer.

[19] The rejection of the grandmother as a potential carer did not feature in the Trust's final report or statement of facts save for the briefest of mentions. None of the discovery relating to the decision making provided to me was made available to Judge Bagnall.

[20] The Trust accept that the initial report did make the two recommendations, but counter the grandmother's general argument by referring to a meeting of 30 March 2021 when an element of scepticism was expressed. The main author of the report said there was a lot the Trust did not know and there were a 'lot of unknowns.' There were further references to the grandmother minimising any difficulties, with the Team Leader who signed off on the report indicating that he thought that the grandmother had been saying what the author of the report wanted to hear and advising that placing AR with the grandmother could result in 'history repeating itself.' The person chairing the meeting observed the grandmother 'is very naïve or shows a lack of insight', and may manage one child without issue. Later

she questioned if the grandmother fell into the category of 'faking good' and concluded that a joint placement of both grandchildren could 'potentially ruin it for both of them' but that a psychological assessment would 'be interesting.'

[21] The Trust argue that the grandmother's interaction with social workers during May 2021 presented the Trust with evidence that suggested that the grandmother was not going to be a viable carer for the child. That interaction revealed a number of significant negative factors:

On 8 June 2021:

- a) when asked to consider how she could meet both children's needs she became defensive deflecting the issue by referring to the mother;
- b) she indicated that her granddaughter had not suffered trauma;
- c) she made general accusations against the mother but declined to specify the safe-guarding issues she was raising;

On 15 June 2022:

- a) When asked to provide consent for her electronic care records she declined;
- b) When discussing her granddaughter's care she was reluctant to admit her daughter had an issue with alcohol;
- c) She stated that she had a 'brilliant relationship' with her own husband and there were no problems. (During the outline assessment in March she referred to her husband as a heavy drinker and verbally abusive. On one occasion she had to involve the police and eventually separated from him due to his behaviour. She said that she did not think her husband's behaviour had any impact on her children.)
- d) When asked if there was any social services involvement in relation to her parenting she denied this, although when reminded she did accept there had been involvement in relation to her youngest child;
- e) Two of her children having died, she was asked if alcohol and/or drugs had been a factor. She became very evasive.
- f) In what was a 'self-report' assessment she referred social services back to its own records rather than address questions concerning her children.

[22] A Trust feasibility kinship assessment of 8 July 2021 concluded that the grandmother continued to demonstrate a lack of understanding around AR's needs, was presenting at times as obstructive and defensive, and that there were concerns that she could work openly and honestly with the Trust. Further concerns were also

raised. The recommendation was that a full kinship assessment would not be offered. This recommendation then formed the basis of the later decision-making particularly at the meeting of 13 July 2021 which noted the reasonable caring role for the granddaughter but recognised the additional placement would cause difficulties. The meeting did note that the grandmother may request an independent assessment.

[23] A LAC meeting on 3 August 2021 formally approved the care plan. The grandmother had been offered monthly contact. Further detail was given with a reference to the 13 July 2021 meeting and the consensus that a full kinship assessment would not be offered.

[24] The guardian supported the Trust's position before Judge Bagnall and before this court. The mother took a neutral position before Judge Bagnall in respect of the Trust's applications but was vehemently opposed to the grandmother's application to be joined as a party. The mother made certain allegations about the grandmother, all of which were denied. It is not necessary for this court to conduct a fact-finding hearing, save to note that the wishes and feelings of AR's mother are clearly stated.

Consideration

[25] I have set out in some detail the decision making process whereby the Trust first considered the kinship option, suggested a psychological assessment and then rejected that and decided that a full kinship assessment would not take place. None of this information was available to Judge Bagnall, but the principle reason for this was the inaction of the grandmother. (There is no suggestion or evidence that the solicitors were in any way responsible for the delay and the grandmother has not suggested that they were.)

[26] The first reference to the grandmother having involved her solicitor is 30 March 2021, with further references being made by the grandmother in early June 2021. In early August she knew that she was not going to receive a full kinship assessment. Her solicitor appeared to become active in early September 2021.

[27] The grandmother has offered an excuse for her inaction which would cover a one month period, but no proper excuse or explanation is offered for the remaining period, initially from April 2021 and more particularly from September 2021. No excuse was offered to Judge Bagnall who was faced with a last minute application for leave to join the proceedings. It seems bizarre that the grandmother had not instructed her solicitor that she had been in an intensive care unit and suffering from 'long covid.'

[28] The reality is that the grandmother has shown an extremely lackadaisical approach to her involvement in her grandson's future. Taking the end of March 2021 as a potential start date, there is no real evidence of engagement with the court process for 9½ months and if we take the beginning of August 2021 when she knew she was definitely not going to be assessed by the Trust and she was aware of the hearing date in January 2022, the period is 5½ months. Taking out the one month

period for her covid debilitation, we are left with significant and unexplained periods of inaction and apparent indifference on her part.

[29] The Article 10(9) factors have relevance. The grandmother is seeking to be joined for the purpose of advancing an Article 8 residence order application or in the alternative a care plan with AR residing with her. She is a connected person. The application for leave is not likely to disrupt the child's life. The child's future with the current care plan is adoption and the granting of leave may delay that outcome. The mother is vehemently opposed to any real involvement of the grandmother in AR's life. She makes serious allegations against the wider paternal family. Whether the mother's animosity is well founded is largely irrelevant. The fact that she holds such animosity is not.

[30] The consideration largely turns on the reasonable prospect of success of the grandmother's attempt to involve herself in AR's life. Her argument has a superficial attraction in that a psychological assessment was suggested but never carried through. However, on a fuller analysis I consider that the Trust was acting appropriately when it decided, after further investigation, not to proceed with the assessment. There was ample evidence to support the Trust's contention about the grandmother's lack of cooperation, her evasiveness and inaccuracy about recounting historical events.

[31] The medical records issue is a prime example. The grandmother's health was a major concern. At the age of 39 she suffered a heart attack requiring surgery and the fitting of a stent. She has chronic anxiety, sciatica, and is diagnosed as a type-2 diabetic. At the 30 March 2021 meeting, the Team Leader expressed the opinion that he had concerns about her health. It was, however, reported that the GP did not feel that her health would be an issue but was unlikely to commit to giving such an opinion. The access to the medical records was critical. The grandmother refused to permit access. The excuse offered at the time, and defended before this court, was that she thought that she had already given permission. Whether that is correct is largely irrelevant. It was a simple request which required no more than signing a form. The refusal speaks volumes about the grandmother's attitude and approach to this matter. It displayed a spirit of non-cooperation on an issue that directly related to AR's welfare and her physical and emotional ability to care for him.

[32] The reality is that for the reasons that have been identified by the Trust there is no realistic prospect of success for the grandmother in asserting her claim to be considered as a viable carer for her grandson.

[33] She has had very limited contact with the child apart from the monthly one hour contact sessions and does not have the same solid foundation of the grandmother in the *Re B-A* case.

Conclusion

[34] From the very limited information before Judge Bagnall there can be no doubt

that she was correct in refusing the leave application. I have had the benefit of more extensive argument and access to many more documents and on my assessment of the application it is not particularly meritorious. The appeal is therefore dismissed and the orders below affirmed. The guardian will be discharged. There will no order as to costs save for the usual taxation orders for legally assisted parties.