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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION (FAMILY APPEAL TO THE HIGH COURT)

ON APPEAL FROM THE FAMILY CARE CENTRE SITTING AT CRAIGAVON

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IN THE MATTER OF AN APPEAL UNDER THE CHILDREN (NORTHERN IRELAND) ORDER 1995

BETWEEN:

AB

Appellant;

-and-

CD

Respondent.

IN THE MATTER OF DD
DATE OF BIRTH: … 2011

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McALINDEN J

[1] This is an appeal against the decision of Her Honour Judge McColgan QC on 25 January 2019 in which she dismissed on the merits the appellant's application made pursuant to Article 7(3) of the Children (Northern Ireland) Order 1995 ("the 1995 Order") for the removal of CD's parental responsibility in respect of DD. The appellant and the respondent were never married and the respondent has parental responsibility by virtue of the fact that he was formally registered as DD's father following her birth.

[2] The South Eastern Health and Social Care Trust has shared parental responsibility for DD by virtue of a final Care Order granted on 10 May 2018. DD resides in a kinship placement with her maternal grandmother. The appellant has regular contact with DD but the respondent presently has no direct or indirect contact with DD, nor has he made any specific application for same. It should be

noted that the respondent was only recently released from prison following his conviction for the offences which are described in paragraph [5] below.

[3] The present proceedings were commenced by way of a C1 application lodged by the appellant on 24 September 2015. The application was heard by HHJ McColgan QC on 10 March 2017 and 13 March 2017 and both the appellant and the respondent gave evidence and were cross-examined. HHJ McColgan QC delivered her judgment on 23 March 2017 in which she dismissed the application.

[4] In giving her decision, HHJ McColgan QC stated that the application was based to a large degree on the fact that the respondent had previous convictions for sexual offending. On 23 March 2002 he was convicted of three offences committed on 7 November 2001; namely, indecent assault of a female, assault occasioning actual bodily harm and attempted rape. The victim was a teenage girl. The total sentence imposed was four years in custody and two years on probation. The respondent was released from prison on 7 November 2002. In addition to being the subject of a probation order upon his release he was placed on the Sex Offender's Register and was made the subject of a Sexual Offences Prevention Order.

[5] On 22 June 2016, the respondent was convicted of four offences of indecent assault committed between January 2006 and November 2006. The sentence of the court on that occasion was the imposition of a determinate custodial sentence of six years with three years in custody and three years on licence. He was again placed on the Sex Offender's Register and was made the subject of a Sexual Offences Prevention Order. The victim in that instance was fourteen years old when she first encountered the respondent and was fifteen years old when she became pregnant.

[6] The respondent's previous sexual offending behaviour was first revealed to the appellant when the police called at the appellant's home on 5 December 2011 and found the appellant and the respondent there with the child DD who was then three weeks old. At that time, the appellant was nineteen years old and the respondent was forty-four years old.

[7] At the substantive hearing before the Learned County Court Judge, in addition to relying on the previous convictions of the respondent, the appellant in her written statement of evidence sought to make out the case that the respondent had been violent towards her during their relationship which started when she was a minor and she also alleged that he had raped her during the course of the relationship. It was alleged that the respondent had also threatened violence against the child DD. The appellant also alleged in her statement of evidence that these matters had been reported to the police and that a decision had been taken to prosecute the respondent for rape and causing grievous bodily harm. The respondent accepted that an allegation of rape had been made after the relationship had finished and that this allegation was at that time being investigated by the police. He denied this allegation and he further denied that he ever assaulted the

appellant or threatened his daughter or that any such matters were the subject of any police investigation.

[8] At the outset of the hearing on 10 March 2017, HHJ McColgan QC indicated that in respect of oral evidence, she wished to have two aspects of evidence covered with the appellant, namely:

> "One, why she's making this application at this time. Two, what was her state of knowledge in relation to the defendant's previous offending when she embarked upon a relationship with him. Those are the two aspects I want you to cover."

It is clear from the transcript of the appellant's examination in chief and cross-examination that she was not questioned about any allegations made by her in respect of serious assault or rape allegedly perpetrated by the respondent. Further, the respondent was not questioned about any of these allegations either in examination in chief or cross-examination.

[9] In giving her judgment, HHJ McColgan QC stated that the application before her based to a large degree upon the fact that the respondent had previous convictions for sexual offending. She went on to set out the nature and extent of the proven offending. She then stated:

> "AB is now married to EF and her third child is due in July of this year. The case made for AB is contained at paragraph 4.1 to 4.9 of her skeleton argument. She has made a number of serious allegations against CD, but those matters have not yet been tested in court. They cannot, therefore, be considered as part of the parental application. She believes that proceedings are pending but there is at least some uncertainty about that. In brief, the argument advanced on behalf of AB is that in view of CD's criminal background and the fact that he has failed to play a significant part in DD's young life thus far, his parental responsibility should be removed. She argues that DD would be at risk of harm (1) directly from CD, (2) through non-direct intervention should he seek to participate in her life as a consequence of maintaining parental responsibility, and (3) by virtue of the stigma attached to being the daughter of a paedophile."

[10] Further reference to the appellant's allegations was made by HHJ McColgan QC during the course of her judgment when she stated:

> "The mother now makes serious allegations against CD in her statement dated 20 December 2016. Those allegations were not made contemporaneously in late 2011/early 2012 when the

> Trust initiated child protection procedures. They appear to have first been disclosed within an application for a non-molestation order in late 2013, when the allegation of rape was made, and to the Trust in 2015 after a case conference on 24 April 2015."

[11] In giving her decision, HHJ McColgan QC acknowledged that the Trust formally adopted a neutral stance in relation to the application and it is to be noted that the Trust has also adopted a neutral stance in respect of the appeal. The Learned Trial Judge stated that she had heard evidence from appellant and the respondent on a number of discreet issues "and the remainder of the case has been presented to me in the submissions of Counsel … I have considered all their submissions and all of the documents furnished to the court and I am very grateful to Counsel for their help in this case. I must determine however what is in the best interests of DD."

[12] The Judge then went on to state that:

> "The main thrust of the application is based on CD's previous convictions, and particularly those relating to his sexual and violent offending towards teenage girls. Those convictions relate to offences which predate the birth of DD by six and eleven years. DD's mother was aware of the earlier offences three weeks after DD's birth and contact was facilitated between CD and DD thereafter, with approval of social services until 2013. AB then formed a relationship with GH, and DD now believes him to be her father. This was encouraged by AB."

[13] The Judge continued:

> "A Trust application to facilitate contact between GH and DD before Christmas 2016 was opposed by AB. Now AB is married to EF and she is expecting a third child. I am also told that DD has been registered in school as "DF". All of this is very confusing for a young child. DD is presently the subject of an Interim Care Order. She has a right to her identity, both in respect of her maternal and paternal heritage. The issues are sensitive in many ways and further complicated by the fact that she has been led to believe that GH is her father. Those issues will have to be addressed in the care planning process."

The Judge concluded:

> "Taking DD's welfare as the paramount consideration and bearing in mind the welfare check-list, I am not satisfied that a

> revocation of parental responsibility would be necessary or proportionate in this case. The burden of proof has not been discharged and I refuse the application."

[14] The appellant appealed this decision to the High Court and the matter was mentioned before Keegan J on 20 March 2018. Both parties were represented by Senior Counsel on that occasion and the court was informed that it had been agreed between the parties that the matter should be remitted back to the Family Care Centre sitting at Craigavon so that HHJ McColgan QC could hear evidence in respect of "the new allegations" and, thereafter, make a fresh determination, on the basis of all the evidence. This court has been informed by the parties that the phrase "the new allegations" encompasses the allegations set out in the appellant's statement of evidence dated 20 December 2016 and which were rebutted in the respondent's statement of evidence dated 26 January 2017 but were not the subject of oral evidence at the hearing of the matter before HHJ McColgan QC.

[15] The matter came before HHJ McColgan QC on 25 January 2019. The matter was specially listed for hearing on that date. The parties were represented by Senior Counsel. The court was informed by Senior Counsel for the appellant that she had informed her solicitor the day before the hearing date that she was only advised of the date the day before the hearing, that she had a contact session arranged with one of her children for the day of the hearing and that she would be very reluctant to miss that contact session. Senior Counsel for the appellant stated that he was satisfied that the appellant had been advised of the date of the hearing well in advance of the hearing and he specifically stated that:

> "I can only suspect that perhaps she is reluctant to come and give evidence, as you know she was reluctant to engage with the police about these allegations."

Senior Counsel formally applied to adjourn the matter to enable the appellant's legal team to speak to her and reassure her and secure her attendance. This application was opposed by Senior Counsel for the respondent and HHJ McColgan QC having heard both Senior Counsel, refused the adjournment and dismissed the appellant's application for removal of the respondent's parental responsibility.

[16] The appellant appealed the order of HHJ McColgan QC by Notice of Appeal dated 8 February 2019. The stated grounds of appeal are that the Judge erred in her decision to refuse the appellant's application to terminate the parental responsibility of the respondent. It is alleged that this decision was not proportionate, was in breach of the appellant's Article 8 rights and was plainly wrong. It is alleged that the decision was taken without due regard to the welfare checklist and that the Judge did not attach sufficient weight to the welfare of the child. It is alleged that the Judge failed to take into account all relevant matters and made a decision which was not in the best interests of the child. It is alleged that the Judge failed to take into account the appellant's ongoing concerns that the respondent poses a risk of sexual,

physical and emotional harm to the child by virtue of his criminal record for sexual offences against children. At the time of the appeal, the respondent's release date was then imminent and the appellant alleged in her Notice of Appeal that the respondent's relevant record indicated a propensity to reoffend and the respondent, therefore, posed a significant risk to the appellant and her daughter. It is alleged that the Judge failed to attach sufficient or any weight to the fact that the respondent is a convicted paedophile who at the time of the appeal was serving a sentence for sexual offences against the mother of another one of his children and previously gave evidence that he intends to seek contact with that child despite consenting to the termination of his parental responsibility in that instance. It is alleged that the Judge failed to attach sufficient or any weight to the fact that the respondent obtained parental responsibility in respect of the child DD after concealing his status as a convicted paedophile from the appellant and hiding his relationship with the appellant from the PSNI, leading to a conviction for breach of a Sexual Offences Protection Order. Finally, it is alleged that the Judge failed to attach sufficient or any weight to the evidence previously given by the appellant regarding the abusive nature of her relationship with the respondent.

[17] The appellant's skeleton argument contains a number of important factual assertions set out at paragraphs 2.5, 2.7 and 2.8. Paragraph 2.5 states that following the dismissal of her application on 23 March 2017 she gave instructions that she wished to introduce fresh evidence against the respondent relating to the sexual, physical and emotional abuse she was subjected to during her relationship with the respondent. Paragraph 2.7 states that when the matter was sent back to HHJ McColgan QC, the appellant confirmed that she did not wish to pursue her complaint with the police "as she was too distressed by the ongoing court proceedings and her mental health had deteriorated." Paragraph 2.8 states that the appellant did not attend court on 25 January 2019 because she was unaware of the date. I have already set out how this matter was dealt with by Senior Counsel when an application to adjourn the case was made on that date. Paragraph 2.8 goes on to state that at a subsequent consultation on 6 February 2019, the appellant made out the case that her mental health had significantly deteriorated and that she was extremely upset and distressed in relation to the ongoing proceedings. Paragraph 2.10 of the skeleton argument states:

> "The appellant mother wishes to appeal the decision of the court dismissing her application to terminate CD's parental responsibility and proceed with her appeal <u>in the absence of fresh evidence</u>." (Emphasis added).

As a result of the approach adopted by the appellant, the grounds of appeal set out in the skeleton argument which are the grounds pursued at the hearing do not include the ground that that the Judge failed to attach sufficient or any weight to the evidence previously given by the appellant regarding the abusive nature of her relationship with the respondent. The relevant background and chronology of events set out in section 4 of the skeleton argument contains the following

information at paragraphs 4.18 and 4.19. The PSNI had sought to carry out an ABE interview with the appellant regarding her complaint of rape and assault by the respondent. On 20 August 2018, the appellant provided a statement of evidence "confirming that she has not and does not wish to pursue her criminal complaint against CD." The appellant "has not taken part in an ABE interview and does not intend to undergo an ABE interview."

[18] Paragraph 4.20 of the skeleton argument makes the following case in respect of the appellant's failure to attend court on 25 January 2019:

> "The mother instructs that due to a deterioration in her mental health, she does not wish to attend court to give fresh evidence against CD relating to the sexual, physical and emotional abuse she was subjected to during the relationship."

[19] At the hearing of this appeal which proceeded on 15 November 2019 by way of oral and written submissions, both parties were represented by Senior Counsel, with Mr McGuigan QC and Ms Laura Magill representing the appellant and Ms Doherty QC and Mr Mulvenna representing the respondent. Both parties submitted fresh skeleton arguments for the appeal. I have already referred to the appellant's skeleton argument which is dated 6 June 2019. The respondent's skeleton argument is dated 7 June 2019. I am grateful to Counsel for the quality of their written and oral submissions. This is an unusual case. The evidence which was adduced in this case was in the form of written statements of evidence provided by the parties prior to the hearing of evidence on 10 March 2017 and these statements were supplemented by the oral evidence of the parties on that date. Oral submissions were made by Counsel for both parties on 13 March 2017 and the Judge gave her decision on 23 March 2017. The appellant appealed and when the matter was mentioned before Keegan J on 28 March 2018, she was informed that the parties had agreed that the matter should be remitted to HHJ McColgan QC to hear additional evidence about the physical, sexual and emotional abuse of the appellant by the respondent during the relationship. When the matter was remitted, it would appear that contrary to the appellant's initial statement of evidence, the prosecution of the respondent for rape and serious assault was not imminent. On the contrary, the appellant subsequently confirmed that she had decided not to pursue her complaints with the police and in relation to this appeal, this court has been specifically informed that the appellant does not wish to provide any new evidence about the respondent's alleged physical, sexual and emotional abuse of the appellant, despite this being the very reason why the matter was remitted back to HHJ McColgan QC. Although this is stated to be an appeal against the decision of HHJ McColgan QC on 25 January 2019, since the appellant has decided not to pursue the issue of physical, sexual and emotional abuse of her by the respondent during the relationship, it is, in reality an appeal against the decision of HHJ McColgan QC made on 23 March 2017 and affirmed on 25 January 2019.

[20] Article 7(3A) of the 1995 Order provides that a person "who has acquired parental authority under paragraph (1), (1ZA) or (1A) shall cease to have that responsibility if the court so orders." The parties were able to agree that the four main authorities relating to termination of parental responsibility were *Re P (Terminating Parental Responsibility)* [1995] 1 FLR 1048, *CW v SG (Parental Responsibility: Consequential Orders)* [2013] 2 FLR 655, *Re A (Termination of Parental Responsibility)* [2013] EWHC 2963 and *Re D (Withdrawal of Parental Responsibility)* [2015] 1 FLR 166. Reference to the case of *Re P (Parental Responsibility)* [1997] 2 FLR 722, is also appropriate even though it is a case in which the applicant sought to acquire parental responsibility.

[21] Having regard to these authorities, it would seem that applications to remove parental responsibility commonly are brought in four broad situations. These are:

(a) cases involving the sexual assault of the child in question or a sibling of that child;

(b) cases involving the infliction of non-accidental injury on the child in question or a sibling of that child;

(c) cases involving severe domestic abuse of the other parent of the child in question; and

(d) cases involving significant criminal behaviour, usually sexual offending in relation to adults or children outside the family.

Some different issues may arise in each of these situations but each situation also gives rise to a number of common issues. In light of the fact that there is a large degree of overlap when it comes to the analysis of the issues arising in these situations but at the same time there are some subtle differences in the approaches of the courts when faced with different situations, it is important that I indicate at the outset that, along with HHJ McColgan QC, I regard this case as one in which the application was based to a large degree on the fact that the respondent had previous convictions for sexual offending and that his sexual offending was in respect of underage females who were outside the family and that any principles to be derived from my decision in this case must be applied with this in mind.

[22] When considering the authorities it is instructive to note that *Re P* [1995] 1 FLR 1048 was an application for termination of parental responsibility in a case where the respondent had caused very severe non-accidental injuries to the subject child. *Re P* [1997] 2 FLR 722 was an application for parental responsibility by a father who had been convicted of a number of serious robberies and had received lengthy sentences of imprisonment. *CW* was an application for termination of parental responsibility in a case where the respondent had sexually abused two of the male subject child's older female half siblings. *Re A* was an application for termination of parental responsibility in a case where the respondent was guilty of

severe domestic abuse of the mother of the subject child. *Re D* was an application for termination of parental responsibility in relation to a male child where the respondent had sexually abused two of the subject child's older female half siblings.

[23] Having considered the authorities referred to above, I am able to set out the following propositions which are relevant in this type of case:

(a) The concept of parental responsibility describes an adult's responsibility to secure the welfare of the subject child which is to be exercised for the benefit of the child not the adult;

(b) When the court is considering an application for termination of parental responsibility, the child's welfare will be the court's paramount consideration;

(c) The paramountcy test is overarching and no one factor that the court might consider in a welfare analysis has any hypothetical priority;

(d) There is ample case-law describing the imperative in favour of a continuing relationship between both parents and a child so that ordinarily a child's upbringing should be provided by both parents and where that is not in the child's interests by one of them with the child having the benefit of a meaningful relationship with both;

(e) Where the court has applied the concept of the paramountcy of welfare, the court will have identified the correct principle to apply. If the Court analyses welfare by reference to the welfare checklist, the court will have provided itself with an appropriate analytical framework against which to provide reasons for its decision. However, the Court may look at other potentially relevant factors such as parenthood, commitment, attachment and motive so long as the court does not raise any one or more of these factors to the status of a competing presumption or test by which the application is determined;

(f) The court must have regard to the fact that the removal of parental responsibility or indeed the refusal to make such an order clearly involves an interference with Article 8 rights of one or more of the individuals at the heart of the case and, therefore, any such interference must be in accordance with the law, necessary and proportionate in the sense that the court must take the most proportionate route to a welfare resolution which is consistent with the best interests of the child concerned;

(g) The test by which to judge proportionality is as described by Lord Reed in *Bank Mellat* [2013] UKSC 39. The Judge has to consider:

(i) whether the objective of the measure is sufficiently important to justify the limitation of a protected right;

(ii) whether the measure is rationally connected to the objective;

(iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and

(iv) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

[24] It is also important to consider the approach to be adopted by an appellate court in a case of this nature. The approach to be adopted by the High Court in dealing with an appeal from the Family Care Centre in a case of this nature is as set out in *Re B* [2013] UKSC 33 and the subsequent UKSC case of *Re R (On the application of AR) v Chief Constable of Greater Manchester* [2018] UKSC 47 at paragraphs [61] to [64]. For present purposes it is instructive to set out verbatim paragraphs [61] to [64] of the *AR v Chief Constable of Greater Manchester* case:

> "[61] In the light of that review, I agree with Mr Southey that the Court of Appeal applied too narrow a test, by asking simply whether the judge's reasoning disclosed a "significant error of principle". That expression was indeed used by Lord Neuberger, but he linked it to the question of whether the judge had "reached a conclusion he should not have reached" (*In re B,* para 88). That passage preceded and was separate from his consideration of the "standard" of review (para 91). As Lord Clarke said in *Abela* the question in relation to the standard of review is whether "the judge erred in principle *or was wrong* in reaching the conclusion which he did" (para 23, emphasis added).
>
> [62] So far I have omitted any reference to one passage in Lord Neuberger's judgment. After his discussion of the "standard" of review, while acknowledging the "danger in over-analysis", he added the following by way of further explanation:
>
> > 'An appellate judge may conclude that the trial judge's conclusion on proportionality was (i) the only possible view, (ii) a view which she considers was right, (iii) a view on which she has doubts, but on balance considers was right,

> (iv) a view which she cannot say was right or wrong, (v) a view on which she has doubts, but on balance considers was wrong, (vi) a view which she considers was wrong, or (vii) a view which is unsupportable. The appeal must be dismissed if the appellate judge's view is in category (i) to (iv) and allowed if it is in category (vi) or (vii)'. (para 93)
>
> He added further comments on categories (iv) and (v) of this analysis (para 94).

[63] With hindsight, and with great respect, I think Lord Neuberger's warning about the danger of over-analysis was well made. The passage risks adding an unnecessary layer of complication. Further, it seems to focus too much attention on the subjective view of the appellate judges and their degrees of certainty or doubt, rather than on an objective view of the nature and materiality of any perceived error in the reasoning of the trial judge. The passage has not been without its critics. Professor Zuckerman (*Civil Procedure: Principles and Practice* 3rd ed, paras 24.209-210) has described it as "puzzling", and saw the difference between categories (iv) and (v) as "so fine as hardly to matter". In any event, I do not understand this passage to have been essential to Lord Neuberger's reasoning or that of the majority. (As already noted, Lord Wilson limited his agreement to paras 83-91).

[64] In conclusion, the references cited above show clearly in my view that to limit intervention to a "significant error of principle" is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle - whether of law, policy or practice - which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be "wrong" under CPR 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said (*R (C) v Secretary of State for Work and Pensions* [2016] EWCA Civ 47; [2016] PTSR 1344, para 34):

> '… the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong'."

[25] Any examination of the decisions of HHJ McColgan QC must be carried out using the propositions set out in paragraph [20] above and the guidance to be extracted from the *Re B* and *Re AR* decisions on the role of the appellate court. Having carefully read the statements of evidence of the parties, the transcripts of their evidence, the Article 4 report, the Social Work statements, the skeleton arguments of the parties submitted to the lower court, the skeleton arguments of the parties submitted to this court, the position paper submitted to the lower court on behalf of the Trust, and the transcript of the judgment of HHJ McColgan QC, and having carefully listened to the fair, balanced, carefully constructed and constructive submissions of Mr McGuigan QC and Ms Doherty QC, including the acceptance by Mr McGuigan QC that he could not point to one definitive error made by the Judge but was, in effect, forced to make the case that, on the evidence which was presented before her, no Judge, correctly weighing the evidence, could have reached the decision that she did; in effect putting forward a case of irrationality in the Judge's decision making, I conclude that the Judge clearly articulated the correct test and considered the key facts, circumstances and issues that were relevant to this application. She gave appropriate weight to the relevant matters that were proved in evidence. She utilised the welfare checklist as an analytical tool and reminded herself of the actual and potential interference with Article 8 rights and the need for any such interference to be justified as necessary and proportionate. Having clearly carefully considered all these facts and circumstances, the Judge concluded that the termination of parental responsibility was neither necessary nor proportionate. Having carefully considered the matter, I am firmly of the view that it cannot be said that the Judge fell into error in the manner in which she dealt with this case, in her consideration and analysis of the evidence or in her decision making. I am firmly of the view that it cannot be said that in any respect, either of her decisions were wrong.

[26] I, therefore, dismiss the appellant's appeal and affirm the Order of HHJ McColgan QC whereby she refused the appellant's application for an Order terminating the parental responsibility of the respondent in respect of the child DD.

[27] Both parties are legally aided and both parties are represented by Senior Counsel which was clearly appropriate. I direct legal aid taxation of the parties' costs and I certify for Senior Counsel.