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Judgment: approved by the Court for handing down | *Delivered:* **15/12/2005**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

H

Appellant

and

C

Respondent

Before Kerr LCJ, Nicholson LJ and Campbell LJ

KERR LCJ

[1] This is an appeal from the decision of McLaughlin J dismissing the appellant's application for a residence order in respect of his daughter, E, and making a residence order in favour of the child's mother, C. We shall use the same acronyms that the learned judge adopted to describe the various persons in the proceedings.

[2] The background to the unhappy dispute between H and C about where their daughter E should live has been set out with admirable clarity in the judgment of the learned judge and need not be rehearsed here. We shall therefore move directly to the arguments presented on the appeal which was conducted before this court yesterday. R, who is a qualified barrister, presented the appeal on behalf of H as his Mackenzie friend, rather than in

any professional capacity. R is the partner of H and they have together cared for E since she returned to Northern Ireland in 2003.

[3] McLaughlin J found that either of her parents would provide E with a loving and caring home environment. With that conclusion all the members of this court wholeheartedly concur. Having carefully reviewed the evidence that was produced to the court below we are firmly of the view that both parents and their present partners are responsible and conscientious. All are determined to ensure that E will receive everything that is required to provide her with a safe and secure upbringing and, after much careful scrutiny of the evidence, we are satisfied that both parents and their present partners are capable of fulfilling that aspiration. We have no reason to doubt that it will be realised in whatever surroundings E finds herself.

[4] R criticised the judge's decision firstly because, she said, he had dispensed with the statutory requirements for matters to be considered in relation to decisions about the upbringing of a child, set out at article 3 of the Children (Northern Ireland) Order 1995, the so-called 'welfare checklist', and had substituted for this a series of factors of his own devising that failed to cover the range of considerations that were required to be taken into account. She submitted that it was incumbent on the judge to consider each element individually and to make clear what weight he had attached to each.

[5] It is necessary to recall what the judge said about the welfare checklist. After setting out the list, he said in paragraph 26 of his judgment: -

> "These issues must be considered in every case and the importance of each will vary from case to case. I do not consider it necessary to go through each of the elements of the checklist seriatim, instead, having considered this matter, I believe I must find, inter alia, the answers to the following critical questions:
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> a. What are the true wishes and feelings of E about where she should live?
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> b. How much weight should I give to her wishes and feelings having regard to her age and understanding?
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> c. How important is it that she should grow up in the same household as her half siblings rather than maintain contact with them through periodic visits and other methods.

> d. Acknowledging the importance of contact with the absent parent, who will best promote such contact during her childhood?
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> e. What would be the consequences of moving her and would such a move bring sufficient benefits to justify disturbing the status quo?"

[6] This passage contains a clear acknowledgment by the judge that each of the elements of the checklist must be considered in every case. As he pointed out, however, the relevance and importance of some of the matters adumbrated in the list must vary from case to case. This is an unexceptionable – indeed, an inevitable – observation. In some cases, for instance, a child's physical needs may be better provided for with one parent than the other. In such a case that factor is likely to loom large in the decision as to her future. In another case the physical needs of the child will be adequately catered for whichever parent is the principal carer. In that circumstance this factor will be of no great consequence.

[7] We can find no reason in principle that a judge should be obliged to rehearse in his judgment every factor detailed in the welfare checklist and to state what weight he has attached to each. Nor are we aware of any authority to support that claim. Provided the judge has regard to all those factors and allocates to each of them such weight as he considers each deserves, his decision may only be challenged on the basis that he has accorded too much or too little weight to one or other of the matters that he is required to take into account. In the present case we are satisfied that the judge had regard to the welfare checklist. He did not substitute for those considerations a set of self made criteria. Rather he highlighted those factors from the checklist that he considered were most pertinent in this case.

[8] Mr O'Hara QC, who appeared with Miss Simpson for the respondent, submitted that in as much as the final issue identified by the judge (*i.e.* whether a move to America would bring sufficient benefits to justify disturbing the status quo) suggested that there was a presumption in favour of preserving the present arrangements for the child, this betrayed a wrong approach. We do not consider that the judge necessarily meant to suggest such a presumption. It is natural that the impact on a child of a major upheaval in her living arrangements must be a factor of some significance in any assessment of where her best interests lie and we think that the judge did no more than reflect this in his reference to the move to America. As a matter of general comment, however, we would accept that, in evaluating the best interests of the child, a court should not erect a presumption in favour of one position or another. The assessment of where a child's best interests lie should be approached in an open-ended fashion, according to each relevant factor the weight that it intrinsically deserves. Clearly, however, where a

radical change in a settled and stable environment is contemplated this will be a factor of some moment.

[9] R suggested that the judge neglected two issues in particular, *viz* the risk of harm to the child and the effect on her education should she return to live in America. She also claimed that he unwarrantably downgraded the importance of her own expressed wishes and feelings.

[10] In advancing the first of these arguments R took us through a number of documents in which concern was expressed about some aspects of the living conditions of C's family. She also referred to problems encountered with E's dentition. Mr O'Hara and Mr Gregory McGuigan (who appeared for the trust) countered with several references to recent assessments of the current domestic circumstances of C, opinions of her doctor as to her reliability as a parent and reports from the school where two of E's half siblings are receiving education.

[11] The learned judge did not deal expressly with the question of the risk of harm to E in his judgment. Mr O'Hara suggested strongly that this was because that factor (in common with a number of others referred to on the appeal) had not been canvassed before him by counsel who then appeared for H. Be that as it may, we are satisfied from our consideration of the material put before this court and available to the trial judge, that there is no reason to apprehend harm to E if she is returned to America. It may well be the case that there were some difficulties in the past when C lived in temporary accommodation but the contemporary evidence clearly indicates that she and her husband will be able to provide a safe and secure environment in which E will thrive.

[12] We have considered the matter of E's education with great care. She is doing extremely well at school and one would not wish to place her educational potential in any jeopardy. But, again, the evidence of her half siblings' achievements and performance in school and the involvement of C and her husband in parent teacher activities augur well for her continued success in her education. One of her half siblings, S, had reading and writing difficulties largely it appears because he was educated at home. Recent indications are that these have been or will be overcome now that he is receiving conventional schooling. Another half sibling, M, who is closest in age to E, excels at school and there is no reason to suppose that E will not do likewise.

[13] R suggested that there was a shift in emphasis by the judge in relation to the importance to be attached to the question of the child's wishes. Whereas in the initial stages he appeared to accord considerable weight to this issue, in his judgment he relegated it to a position of little significance. We cannot accept this submission. In paragraphs [27] to [34] of his judgment the judge

set out *in extenso* a careful review of the child's expressed wishes and we consider that the issue was dealt with in an impeccable and scrupulously fair way. We agree with his assessment that these wishes must be set in their proper context and must be evaluated in a way that reflects the age of the child and the circumstances in which she finds herself. It is entirely unsurprising that she does not wish to leave surroundings that are familiar to her and friends she has made, particularly at school. These are important matters in the life of a young child but there is no reason to believe that she will not settle in her new surroundings, forge new friendships and enjoy a secure and happy life with her half brothers and sisters in America.

[14] The factor that appears to have weighed most heavily with the judge was the relationship that E would have with her half siblings were she to return to live with her mother. Again, R asserted that the judge's attitude to this appears to have changed. She suggested that he initially remarked that on other occasions he had completely ignored this factor, implying that it was of no consequence but, after some discussions with counsel in his chambers (of which she and H were unaware) he suggested that this was one of the major factors in the case.

[15] Before dealing with the argument that the judge placed too much weight on this aspect of the case, we should say something of the suggestion that the judge changed his view about the importance of this issue as a result of what passed between him and counsel in his chambers. We were told by both Mr O'Hara and Mr McGuigan that the only matter discussed in chambers was whether the judge would speak to E to ascertain her views. This discussion was instigated by senior counsel for H. We do not understand why such a discussion could not have taken place in court but the judge is not to be faulted for having agreed to see counsel since, presumably, he was unaware of the reason that the meeting in chambers was sought. There will be occasions where sensitive matters arising in a case such as this can only be raised in a private meeting with the judge but these should be reserved for wholly exceptional cases. A request that the judge should interview the child is not such a case.

[16] In light of what Mr O'Hara and Mr McGuigan have told us, we have no reason to believe that the judge's view of the importance of this issue was in any way influenced by what took place in his chambers. We are bound to say, however, that we find it remarkable that neither H nor R was aware that this approach to the judge had been made. There was no reason that they should not have been told of this and every reason that they should have been kept fully informed.

[17] As to the weight that the judge placed on this factor, we can find nothing on which legitimate criticism can be made. Reading the reports of the social worker about conversations with E's half siblings, it became clear to us how

her relationship with her half brothers and sisters, particularly M, had developed and how there remains substantial potential for the deepening of that relationship to the conspicuous advantage of E. We agree with the judge in his view that these relationships will be of great importance to E. We are in full accord with his view that this was a factor of major importance in deciding where her best interests lay.

[18] Another factor of significance in the judge's estimation was the question of which parent was more likely to promote contact. The judge concluded that an analysis of what had transpired in the past pointed clearly in favour of C. This conclusion was strongly challenged by R who drew to our attention several items of evidence that suggested that C had been duplicitous in her dealings with H in the matter of contact arrangements. She suggested that this made an unhappy contrast with the attitude that both she and H had taken to the question of contact, reminding us that they had both acknowledged that they had taken the wrong approach to this issue in the past and that the proposals that they had lately made as to the level of contact that should take place testified to their responsible attitude to this difficult question now.

[19] None of the parties emerges with any great credit from an examination of their behaviour on the matter of contact in the past. We do not consider that the judge can be faulted, however, in the conclusion that he has reached. In this context it is pertinent to recall what the approach of an appellate court should be to conclusions reached by a trial judge on an issue such as this. In *AR v Homefirst* this court said on this subject: -

> "[74] In *G v G (Minors: Custody Appeal)* [1985] 2 All ER 225 the House of Lords held that the principles applicable to the Court of Appeal's jurisdiction when reviewing a judge's exercise of discretion in cases involving the welfare of children were the same as those which applied to the Court of Appeal's general appellate jurisdiction. It was pointed out that the judge at first instance was often faced with choosing the best of two or more imperfect solutions. The Court of Appeal should therefore only intervene when it considered that the judge at first instance had exceeded the generous ambit within which judicial disagreement was reasonably possible, and was in fact plainly wrong, and not merely because the Court of Appeal preferred a solution which the judge had not chosen. Gillen J held in *McG v McG* [2002] unreported that the same approach should be followed in appeals to the Family Division of

> the High Court from decisions of the Family Proceedings Court.
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> [75] The same principle was expressed slightly differently in *Charles Osenton & Co v Johnston* [1942] AC 130 at 138 by Viscount Simon LC: -
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> > "The law as to the reversal by a Court of Appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty which arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If, however, the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified."

[20] We are satisfied that the judge's decision on the importance of this factor and on where the balance of the evidence lay fell squarely within the range of conclusions available to him. As Mr O'Hara reminded us, the judge had not only the distinct advantage of observing the parents give evidence, he had also a long acquaintance with the case through many reviews and direction hearings. Inasmuch as his decision was informed by the exercise of discretion we can detect no reason to interfere with it and insofar as it was a decision on the facts, formed from his view of the evidence, we acknowledge that he was in a much better position than we to make a reliable assessment of it.

[21] The same approach is appropriate to the criticism made by R of the evidence given by the social worker in this case, Ms Lavelle Harte. R suggested that Ms Harte had formed an unjustified animus towards H and that her view had wrongly influenced the judge. We do not accept those submissions. Again the judge had the advantage of having seen and heard Ms Harte give evidence. He was also clearly fully familiar with the

comprehensive reports that she had submitted. The view that he formed as to her reliability was, in our judgment, fully warranted.

[22] R also raised the question of the judge's impartiality in relation to a remark that he had made at an interlocutory stage about H's conviction of a criminal offence. We have examined that argument carefully but can detect no merit in it. We consider that the painstaking, detailed and impeccable judgment prepared by McLaughlin J bears eloquent witness to the scrupulous care that he brought to bear on every aspect of this difficult case. It is a model of clarity and fairness in which the competing claims of the parties are given meticulous attention and consideration. The appeal must be dismissed.

[23] Before parting from the case we wish to say this. The proposals made by H as to the level of contact that should take place seem to us to be entirely reasonable. We would urge C to approach this issue with a generosity of spirit, recognising the importance to E of her father's influence in her young life to date and the enormous disadvantage that would accrue to her if she was deprived of the fullest opportunity to build on and consolidate that relationship.