Neutral Citation No: [2020] NIFam 25	*Ref:* **HUM11345**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*ICOS No:* **15/91602/01/A01**
	Delivered: **23/11/2020**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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BETWEEN:

ML

Appellant;

and

MO

Respondent.

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The Appellant appeared in person
Ms Harvey BL (instructed by McConnell Kelly & Co) for the Respondent mother

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HUMPHREYS J

Nothing should be published which would identify the child or her family.

Introduction

[1] This is an appeal against the decision of Her Honour Judge Loughran handed down at the Family Care Centre sitting at Belfast Recorder's Court on 7 March 2019. The Respondent is the mother of the child.

[2] The Appellant and Respondent were in a relationship which ended in 2012 and are the parents of a daughter who is now aged 11. The Appellant formerly had direct contact with his daughter but this came to an end in December 2016. This led to proceedings being issued in March 2017 and these were transferred to the Family Care Centre in September 2017.

[3] The Court had the benefit of reports from the senior social worker dated 12 February 2018 and 14 June 2018. Further, the Court exercised its powers under article 56 of the Children (NI) Order 1995 ('the 1995 Order') to have an investigation

carried out into the child's circumstances and this resulted in a report from an independent social worker dated 7 September 2018.

[4] At the hearing in the lower Court the Appellant was legally represented and both social workers were cross-examined by Counsel in relation to the findings and recommendations in their reports.

[5] The learned Judge prepared a detailed written judgment in which she identifies the relevant legal principles, examines the evidence and explains her findings. She made the following Order pursuant to article 8 of the 1995 Order:

(1) The Appellant was to have indirect contact at a frequency of no greater than once every three weeks;

(2) The indirect contact would consist of letters and/or cards and an occasional gift;

(3) Each indirect contact should contain a stamped addressed card to facilitate the Respondent in ensuring the child acknowledged the contact;

(4) The Respondent was to ensure the Appellant received regular photographs of the child;

(5) The Respondent was to ensure that the child sent her father a birthday card each year.

[6] The Appellant now appeals against this decision and, in particular, asserts that the Court ought to have ordered direct contact.

The Legal Principles

[7] This is an appeal pursuant to article 166 of the 1995 Order which gives the High Court jurisdiction to hear and determine appeals from the Family Care Centre.

[8] In *McG v McC* [2002] NIFam 10, Gillen J held that appeals under article 166 to the High Court should be approached on the same principles as govern appeals in England & Wales under the Children Act 1989 and as are set out in *G v G* [1985] FLR 894. Gillen J adopted these words of Waite J in *Re CB (A Minor)* [1993] 1 FLR 920:

> *"No appeal can be entertained against any decision they make…unless such decision can be demonstrated to have been made under a mistake of law, or in disregard of principle, or under a misapprehension of fact, or to have involved taking into account irrelevant matters, or omitting from account matters which ought to have been considered, or to have been plainly wrong."*

[9] This view was confirmed by the Court of Appeal in *SH v RD* [2013] NICA 44 wherein the Lord Chief Justice stated:

> *"Where an appellate court is reviewing the balance struck between several competing factors it should only intervene if the exercise of discretion or judgement is plainly wrong"*

[10] In *N (A Minor)* [2015] NIFam 12 O'Hara J observed:

> *"Appeals from the Family Care Centre are conducted on a confined basis for the reasons set out by Gillen J in McG v McC. 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 or additional statements or reports being filed. This can happen in a number of scenarios but especially when it is contended that circumstances have changed in some truly important way since the decision of the lower court was reached"*

[11] Thus, an appeal under article 166 is not conducted by way of a full *de novo* hearing. Rather, the appellate Court does not rehear evidence but considers submissions from the Appellant as to why the judgment of lower Court was *'plainly wrong'*.

The Evidence on Appeal

[12] The Appellant made an application to have 'fresh' evidence considered in this appeal. This evidence consisted of a series of voice and video recordings made by the Appellant between 2013 and 2016 and which consist of various interactions between the Appellant, the Respondent and the child. After he had dispensed with his legal advisors, the Appellant brought this matter before McAlinden J on 14 February 2020. I am informed by Counsel for the Respondent that the Court refused the application on that date but no Court Order exists to this effect. In any event, I reconsidered the Appellant's application.

[13] It was the Appellant's case that the recordings were evidence that the child's views on her contact with her father, as expressed to the social workers, had been manipulated by the Respondent. It is evident from the judgment of Judge Loughran that recordings were adduced in evidence by the Appellant at the Family Care Centre – indeed, it was the production of such evidence which precipitated the Court ordering the article 56 investigation. Counsel for the Respondent informed the Court that the lower Court permitted the Appellant to produce transcripts of audio recordings in March and September 2018. The extent to which any of the subject evidence could be regarded as 'new' is therefore doubtful.

[14] The principles behind the admission of evidence on an appeal of this nature are well-established. In *Ladd v Marshall* [1954] 3 AC 745 Lord Denning MR said:

> *"In order to justify the reception of fresh evidence for a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words it must be apparently credible, although it need not be incontrovertible."*

[15] In the context of family law proceedings, the *Ladd v Marshall* principles have been somewhat relaxed. This is because proceedings under the 1995 Order are concerned with the welfare of the child and there may be circumstances in which the refusal to admit fresh evidence would act to the detriment of the child – see, for example, *Re K & S* [2006] NIFam 18, following *Re S* [1995] 2 FLR 639.

[16] In the instant case, I was not satisfied that this was, in fact, 'fresh' evidence. However, even if it were, I determined that this was not an appropriate case to admit such fresh evidence on appeal. It was quite apparent that the evidence was between 4 and 7 years old and there was no difficulty with obtaining it for use before the Judge in the lower court. In the language of O'Hara J in *Re N*, there was nothing to indicate that circumstances had changed in some *'truly important way'* since the decision of the lower Court.

[17] The Appellant was legally represented at the hearing in the Family Care Centre and both social workers were cross-examined on the basis of both their findings and recommendations. I have no doubt that if the material in these recordings served to undermine the evidence of the social workers, it would have been relied upon by Counsel.

[18] I also note that the Appellant elected not to give evidence himself at the final hearing in the Family Care Centre. If the Appellant believed he had evidence which was relevant to the issues to be determined by the learned Judge, this was his opportunity to adduce it. I am not therefore persuaded that the evidence, if admitted, would have had an important influence on the outcome of the case. I therefore refused to admit the evidence of the recordings on this appeal.

The Grounds of Appeal

[19] The grounds of appeal are set out in the Appellant's Notice of Appeal filed on 3 April 2019. In summary these are as follows:

(1) The learned Judge failed to consider that direct contact was in the best interests of the child;

(2) The Court failed to consider that the Respondent manipulated the child and this explained her negative views about contact;

(3) The Court failed to consider what alternative therapeutic work could be undertaken to rebuild the relationship between the child and her father;

(4) The evidence of the social workers was inaccurate and inconsistent.

[20] These grounds were expanded upon by the Appellant at the hearing of the appeal. Rather than merely asserting that the social workers' evidence was inaccurate or inconsistent, the Appellant claimed that they had perjured themselves and he had reported that matter to the PSNI. He also claimed that the reports were riddled with 'lies', and much of the false information provided to the lower Court resulted from the manipulation of the child by the Respondent.

[21] The Appellant went on to assert that the social workers and PSNI were involved in a conspiracy to prevent criminal matters coming to Court and this, in turn, had an adverse impact on these family law proceedings.

[22] Regrettably, after making these allegations, the Appellant chose to absent himself from the proceedings and made no further submissions.

The Respondent's Submissions

[23] Ms. Harvey BL, for the Respondent, made the following submissions:

(1) Judge Loughran conducted a careful and full analysis of the facts and the law and concluded that direct contact was not in the best interests of the child;

(2) The social workers' evidence was subjected to detailed cross-examination and this included the claim that the child was being manipulated by the Respondent. The Judge was perfectly entitled to accept the evidence of the social workers;

(3) The Appellant did not propose any other form of therapeutic intervention. The Judge did consider school counselling as a means of promoting future direct contact;

(4) The Appellant failed to give direct evidence himself;

(5) The Order for indirect contact was in the best interests of the child and arrived at after a full hearing and on the basis of adequate reasons.

Consideration

[24] I have carefully considered the Appellant's grounds of appeal and the parties' respective submissions in conjunction with all the documents in this case. I have reached the conclusion that the decision and reasoning of the learned Judge were unimpeachable. There is no basis whatsoever to say that the decision was *'plainly wrong'* nor is there any arguable claim that the Judge was acting under a misapprehension of fact or a mistake of law. I entirely endorse the learned Judge's analysis of the relevant legal principles.

[25] In relation to the credibility of witnesses, I bear in mind that the learned Judge had the advantage of hearing and seeing the social workers in the witness box. As Lord Hoffman explained in *Piglowski v Piglowski* [1999] 2 FLR 481:

> *"First, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts."*

[26] This Court regards the allegations in relation to the conduct of the social workers as wholly baseless. There is no evidence to support these claims. The learned Judge's approach to the evidence of the social workers and her evaluation of the case cannot conceivably be interfered with by this Court.

[27] Accordingly, I dismiss the appeal and affirm the Order of the Family Care Centre.

[28] In all the circumstances, I make no Order as to costs.