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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

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Delivered: 26/06/2020

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

IN THE MATTER OF THE CHILDREN (NORTHERN IRELAND) ORDER 1995

Between:

MS B

Applicant

and

MR D

Respondent

**IN THE MATTER OF A CHILD KIM
(ORDER OR NO ORDER: ARTICLE 3(5))**

KEEGAN J

Introduction

[1] I have anonymised this case as it involves a child. Nothing must be published which would identify the child or the family. The name given to the child is not the child's real name.

The Application

[2] By virtue of a C1 dated 14 April 2020, the applicant mother applies for a residence order in relation to the child who is now 5½ years old. The respondent father of the child had brought an application for contact which was withdrawn before the High Court in December 2019. In addition to the residence order application, the mother now asks the court to make an order defining contact. It was accepted between counsel that I have power to do that pursuant to Article 10 of the Children (Northern Ireland) Order 1995 ("the Children Order"). During the course of the hearing, I also raised the issue of Article 179(14) of the Children Order which would prevent further applications being brought by Mr D without the leave of the

court. As I raised this, I allowed both parties to file additional submissions. It follows that I have to decide on these three issues in this case.

[3] The matter was heard before me on 22 June 2020 by way of submissions. This was an agreed position which was put to the court in advance of hearing in a Form FCI1 which has been utilised in the Family Division as a result of the Covid-19 pandemic. Both parties agreed that the matter could be heard by sight-link and it proceeded on that basis. I therefore heard oral submissions from both counsel and I received helpful written submissions from counsel in advance. In addition, and by consent to these papers generated by the parties, I considered the social work report filed by Ms Lisa Fields of 1 November 2019 without the need for formal proof.

[4] Ms Simpson QC appeared with Ms O'Reilly BL on behalf of the applicant. Mr O'Donoghue QC appeared with Ms McKeown BL on behalf of the respondent. I am grateful to counsel for their assistance in this matter.

Background

[5] Both parents have other children and social services have been involved with the various families at various different junctures. Ms B has two other children who are half siblings of Kim. Mr D also has two children who are half siblings of Kim. I was told that in relation to one of these children there are ongoing care proceedings in the High Court. In relation to the other child, Mr D has a conviction for child cruelty because that child sustained a fractured skull and a spiral fracture aged 5 weeks while in his care.

[6] Certain other proceedings are relevant to this case. Firstly, Mr D has been before the High Court in relation to non-molestation proceedings brought by Ms B. These resulted in a non-molestation order being made in favour of Ms B by Sir Reginald Weir on 4 December 2019. I am told that that matter is currently on appeal to the Court of Appeal but that that most likely relates to the length of the order rather than the substance of the order. There are also contempt proceedings outstanding against Mr D. The other relevant proceedings are criminal proceedings in that Mr D and his wife were charged in relation to a drug raid and that has resulted in a conviction after guilty pleas to cultivating cannabis, possession of a class B drug and possessing criminal property. I was informed that Mr D was sentenced to a combination order of 3 years' probation and community service.

[7] In addition to the numerous court proceedings, there is a significant social work history in this case. I take the narrative history from the report of Ms Fields, the social worker which was not disputed by counsel during the hearing. Ms Fields was tasked to file a report in relation to Mr D's original application for contact.

[8] In the background history of her report, she sets out the fact that Mr D became known to the Trust in November 2010 due to his oldest child sustaining a fractured skull and spiral fracture while in his care. As a result, this child was

placed in the care of his maternal grandparents under a Care Order and contact between Mr D was to have been supervised. As I have said, Mr D was charged and convicted of child cruelty. Ms Fields also records that Mr D has a significant history of drug misuse and this continued before and after the birth of his eldest child. From the report, it appears that following the injuries to this child, Mr D attended addiction services and reported he was not using drugs. He was then afforded a number of assessments including work under the auspices of the “Resolutions approach” supervised by Mr Stuart White. It appears that Mr D tested positive for drugs during that time and as a result his contact remained supervised.

[9] Mr D commenced a relationship with Ms B in 2013 and they were in a relationship for a period of 2 years. This came to an end shortly before the birth of Kim. Due to concerns principally in relation to Mr D’s cannabis use and gambling issues, a pre-birth risk assessment was completed in respect of the baby and the assessment concluded that Mr D’s contact with this child Kim was to be fully supervised. It appears that Mr D had contact with Kim every Sunday from 1-6pm supervised by his current wife. That pattern continued for some time. However, in August 2018, the Trust received information from the PSNI which confirmed that Mr D’s home was raided for drugs and a substantial amount of cannabis plants were found growing in a bedroom. There were other drugs also found within the home and Mr D was arrested and charged.

[10] Ms B also has a background of social service involvement. There was a private law case in respect of her elder son due to ongoing concerns in relation to some of her lifestyle choices. From 2012, the residence of this eldest child has been with his father. However, the pre-birth assessment in relation to Kim found that there were no concerns in relation to Ms B’s parenting capacity at that time. Ms B has provided full-time care for her older daughter who is now an adult and for her other son until he was seven.

[11] The case in relation to Kim has, as the social worker states in her report, been before the court for three years. Mr D was having contact with the child every Sunday which was supervised by his wife. The social worker points out that throughout this time Mr D made allegations to the Children’s Court Officer and to Gateway alleging neglect of Kim whilst in the mother’s care. Many different allegations were made in relation to inappropriate care and an allegation was made of sexual abuse which led to the child being medically examined. A particular point was raised about home conditions, however it is noted in the report that Gateway Social Services observed that home conditions were of a good standard, clean and warm and there was suitable equipment for Kim’s needs. Kim was also reported to be clean and wearing appropriate clothing. Therefore, none of Mr D’s allegations were substantiated by social services after investigation.

[12] In August 2018, contact between Mr D and Kim was suspended following the drug raids. The social worker does, however, note that a one-off contact took place in December 2018 supervised by Mr D’s aunt. This had been agreed by the court.

Thereafter, there appears to have been a gap in contact and Ms B obtained an ex parte non-molestation order against Mr D on 18 June 2019 as Ms B alleged that Mr D approached her and Kim outside their church and was verbally abusive. Ms B alleged that Kim was frightened by the incident and, as a result, she needed protection.

[13] In relation to Mr D's youngest child, care proceedings were initiated and those remain before the court at present. The social worker points out that there is an interim care order in respect of this child and that Mr D has supervised contact only. A psychological assessment was completed by Dr Pollock during the course of these proceedings. However, Mr D did not allow for the release of that report into these proceedings. This was obviously against the wishes of the other parties including the social services. Mr D was given an opportunity to consider his position, however, when it became clear that the report would have to be shared he withdrew his contact application. I also note that in written submissions reference is made to the fact that Mr D withdrew a previous application for unsupervised contact after he was asked to submit to drug testing.

[14] Ms Fields also sets out the views of both parents in her report. In this section, she states that Mr D presented as aggressive towards her. He also stated that he was a hands-on father and that he thought Ms B was playing games and was very manipulating and did not want to progress contact between him and Kim. In this part of the report, Mr D does not acknowledge the Trust's concerns in respect of having contact with the child and in particular he advised that he did not understand how an incident with one child could have an impact on his contact with other children. He did not understand how the incident on 18 June 2019 resulted in a non-molestation order against him. In relation to an incident on 31 October 2019, the social worker reports that she received a telephone call from Mr D and that Mr D advised her that he saw the mother and child in the main street of the town and feels that the mother is trying to provoke him and that she was aggressive towards him and that the child was simply trying to get his attention. He advised that he had recorded this incident and that was something Kim should not have had to witness. Mr D put this forward as evidence of Ms B not allowing him and Kim to have a relationship.

[15] I pause to observe that during the non-molestation proceedings that this video was played but nonetheless the order was made against Mr D, thereby indicating the weakness of his argument. The social worker concludes:

"Throughout the interview, it was evident that Mr D has extremely limited insight into how his behaviour and choices have led to a poor outcome in respect of his ability to maintain a relationship with Kim."

[16] The social worker also interviewed Ms B. She records that Ms B referred to the incident on 31 October 2019. She advised that she was in a relationship with

Mr D for 2 years and it broke down and that his behaviour is having a negative impact on Kim. Ms B did not dispute that Mr D is a good father and she did speak about the bond that he and Kim had. However, she said she was not agreeable to any type of contact taking place without the psychological assessment and that as a result of the drug raid she was concerned. Ms B also advised of having a positive relationship with Mr D's family and that they would have regular contact with Kim. Ms B advised of the incident on 18 June outside the church which she said frightened the child. Ms B disputed that she was verbally aggressive on 31 October 2019 towards Mr D and said that she was having a day out with Kim collecting pumpkins in the Main Street when Mr D approached her and Kim and was verbally abusive towards her, Mr D blaming Ms B for him not having contact. Ms Fields also records that at the time she was writing the report Ms B telephoned to advise that she had made an appointment with the GP in respect of Kim because she thought that Kim had been having nightmares and had been shouting in her sleep telling her daddy to stop shouting at her and that she had been wetting the bed.

[17] In her report, Ms Fields also documents the welfare checklist in relation to this child and in her conclusion she states that her recommendation is that indirect contact would to some extent re-establish the relationship pending further information before any final decision making. However, due to the concerns about Mr D's lack of insight and responsibility for his own poor decision making, there was no recommendation for direct contact. She pointed out in that report that there had been no direct or indirect contact since December 2018. Her ultimate recommendation is contained under the heading Contact Order. There, she states that Mr D could send cards, presents and photographs via a suitable family member who can ensure that these are child focused. Likewise, Ms B would assist Kim to send cards and photographs of herself. In Ms Fields's opinion, this would to some extent maintain what had once been a relationship which Kim valued.

The Arguments

[18] Ms Simpson QC supplemented her written paper by making the following arguments. Firstly, she relied on the social welfare report of Lisa Fields which recommended that the court make either an indirect contact order or a no contact order at that time. Secondly, she referred to the fact that on 15 November 2019 the father resisted the release of Dr Pollock's report to the social worker and the court. Ms Simpson highlighted the fact that the court stated that the father should have some time to consider this and that on 12 December 2019 the father simply withdrew his application for contact. Ms Simpson maintained that the social welfare report is clear in terms of recommending the child stay living with her mother and that this is a stable environment with her and that supports the making of a residence order. Ms Simpson made the argument that Kim needs the clarity and certainty provided by a court order.

[19] Ms Simpson also referred to the history of this case in that the father has behaved inappropriately for a considerable period of time. She pointed out that the

residence and contact proceedings between the parties in respect of Kim began in 2016, when the father refused to return Kim to her mother following contact and proceedings have been before the courts in one guise or another ever since. She pointed out that the father has only had supervised contact since 2016. Also, she stressed that he has made a large number of referrals to social services none of which are substantiated. She makes the point that the father has convictions for child cruelty in relation to an older child. Ms Simpson highlighted the fact that on several occasions during the course of the proceedings the father has turned up to a relative's home knowing Kim was present and attempted to have unsupervised contact with her in breach of social services' recommendations. In that sense, Ms Simpson stated that an order is needed to define contact in that, she says, the father has adopted the view in the past that there was no contact order saying he was not allowed direct unsupervised contact and this led to difficulties at relatives' homes. As such, Ms Simpson asserted that Mr D will continue to form the view that if there is no court order prohibiting him from having direct unsupervised contact with Kim he might just do this. Ms Simpson also relied on the attendance at the church in June 2019 and the contact on 30 October 2019 where Kim and her mother on the street were subjected to verbal abuse which included words such as 'druggie' and 'rat' and phrases such as 'this is my town.'

[20] Ms Simpson also relied on the fact that in and around January or February 2020 the father sent a toy unicorn to the child as a gift. Sometime after having the toy in their home, the mother and Kim were shocked to hear the father's voice playing from the toy saying "hello Kim, booboo daddy loves you ha ha ha." The mother says that as a result of this the child became afraid and sought comfort. In the light of all of this, Ms Simpson maintained that the orders were clearly required due to Mr D's track record and to provide stability and security for the child and peace of mind to her client.

[21] Mr O'Donoghue QC did not offer any contrary submissions on the history of the case or on any of the factual matters raised by Ms Simpson. In both the written and oral argument, Mr O' Donoghue simply made the case on behalf of Mr D that because there had not been any direct contact for a considerable period of time there was no necessity for any order to be made. He also made the point that since the father has withdrawn from the contact proceedings on 12 December 2019, there is absolutely no need to make a Contact Order. In that vein, the argument was made on behalf of the father that the no order principle contained in Article 3(5) of the Children (Northern Ireland) Order 1995 prevails.

Consideration

[22] In relation to the no order principle under the Children Act which replicates our Children Order, *Hershman and McFarlane, The Children Act & Practice*, Volume 1 Section B 236 states that:

“Where a court is considering whether or not to make one or more orders under the Children Act 1989 with respect to a child, it must 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.”

The authors go on to say:

“Even where there is no dispute about the arrangements for a child, an order may still be justified for other reasons, for example, so that a non-parent can obtain parental responsibility under a residence order or so that a child can feel a greater sense of security about the arrangements that exist (*B v B (A Minor) Residence Order* 1992 2 FLR 327) or in order to add to a parent’s peace of mind (*Re G Children* 2005 EWCA 1283).

Crucially this text states:

“Section 1(5) does not create a presumption against making an order, it merely requires the court to ask the question whether making an order will be better for a child than making no order at all.”

[23] The above reflects the terms of Article 3(5) of the Children (Northern Ireland) Order 1995 which reads as follows:

“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.”

The terms of this provision are clear in that the court must be considering making an order and that means that the other tests will have been considered first. Then, Article 3(5) is expressed in mandatory terms that an order shall not be made unless the court considers that it would be better for the child than making no order. There is clearly no presumption. Rather, each case must be considered on its own merits to decide if an order is better for the child.

[24] In this case, the shape of arrangements is not contentious namely that the child should reside with the mother. The father has withdrawn his application for direct contact. Applying the various tests contained within Article 3 of the Children Order, including the welfare checklist which has been accurately analysed in Ms Fields’s report, the court is considering making Article 8 orders to define residence and contact.

[25] The no order principle in Article 3(5) must then be applied. I have considered the competing arguments and having done so it is clear to me that this case requires the making of various orders to provide some clarity, certainty, stability and security for this family. It is quite clear that there have been prolonged proceedings over many years and that there is discord between the two adults and, in my view, to leave this matter without an order would not serve the interests of this child. This history is important. Mr D has a conviction for child cruelty. He has made substantial allegations against the mother, none of which were found to be verified. He has appeared aggressive to the social worker. He has behaved in a manner which merited a non-molestation order by his behaviour towards the mother, particularly on the public street on 31 October 2019. He has not cooperated with the court processes evidenced most recently by the withdrawal of proceedings after the request for Dr Pollock's report. In my view, all of this is regrettable because notwithstanding the issues Mr D did enjoy supervised contact for a period and there are some positive reports about his relationship with the child. The courts strive to maintain bonds between parents and their children on the basis that parents will work with any conditions the court sets. Mr D wants to set his own rules and therein lies the problem which is of Mr D's own making.

[26] The father's position in relation to contact is unfortunate but it is what it is. I have to decide this case on the basis of the current situation. So, whilst the father may not have initiated any contact in the recent past that is not to say that he will not try to initiate further contact in the future. He has a track record of doing this on his own terms and stepping outside the bounds of the supervision that has been required. To illustrate the point, I was told that he has said, if there is no order he can behave in a certain way. Mr D needs to realise that he cannot just act as he wants. The very simple reason for that in these types of proceedings is that the welfare of the child is the paramount consideration. With all of this in mind, I could not have confidence in Mr D to simply abide by his stated position going forward. In my view, no order would create great uncertainty and fear for the mother and such a situation would not benefit the welfare of this child. I conclude that making orders for Kim is infinitely better than making no order at all given the full history of this case.

[27] Therefore, the decision in this case is tolerably clear that I should make a Residence Order in favour of Ms B. I also consider that I should make an order to define contact arrangements. In my view, it is imperative that this order is clear so there can be no doubt about arrangements going forward. Whilst there will be no provision for direct contact, a positive order will be made for indirect contact which should be two-way. I note that the social services suggest that a family member acts as a *conduit* and so I would ask that the parties discuss this and agree the frequency of the indirect contact. It must also be on condition that it is appropriate as there should not be any repeat of the unicorn incident. The parties should therefore draft up the terms of a Contact Order within 7 days. If there is any dispute the matter can return to me.

[28] In all of the circumstances, I consider that these orders are sufficient to deal with the case. I will not make an Article 179(14) prohibition on future applications at this stage on the basis of Mr D's current position as advanced by senior counsel and on the basis of the certainty provided by the Article 8 Orders.