

Neutral Citation No. [2011] NICty 5

Ref:

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

Delivered: **10/06/2011**

In the Family Care Centre sitting at Belfast

In the matter of the Children (Northern Ireland) Order 1995

And

In the matter of M (a child)

Between

O

Applicant

And

B

Respondent

Her Honour Judge Loughran

The application

The application before the court is an application by O for indirect contact with his daughter, M, who was born in December 2003. M's mother is B. M's parents were

not married to each other but O has parental responsibility by virtue of being named on M's birth certificate as her father.

The background to the application

O is currently serving a 6 year determinate sentence imposed on him in May 2010 for sexual offences against S, the daughter of B who is now aged 16. S is not the child of O. The earliest release date for O is 27 May 2013 and on release O must serve a period of 3 years on licence. He is also subject to the Sex Offender Notification requirements.

On 11 August 2010, following the applicant's plea of guilty and imprisonment, an order was made by the Family Proceedings Court at Ballymena that there should be no contact between O and M. O has stated in his C1 form that he never had a chance to contest the application by B as it was during his criminal proceedings but the respective dates of the proceedings suggest that he is in error on that point.

M and her wishes and feelings

M is a child with ADHD and, according to a report dated 9 March 2011 from Dr Nicholson, consultant paediatrician, her mother told him that M's teacher has confirmed that M has been struggling in the classroom both with her behaviour and her ability to concentrate. M suffers from bedwetting and overall her mother stated to Dr Nicholson that M's behaviour deteriorated between the autumn of 2010 and March 2011. Dr Nicholson saw M again on 31 March and in a report dated 13 April 2011 said that she was on a small dose of Concerta and when it wears off in the early evening she can become quite aggressive. Dr Nicholson increased the dose of Concerta and has arranged to see M in October 2011. M has been referred by her general practitioner to Antrim Family Centre for therapy and behavioural support and to CAMHS because of her behaviour.

I met M on 2 June 2011 to ascertain her views about contact with her father.

Prior to the meeting I received a request that M's mother should be present at the meeting. I indicated that it would be quite inappropriate for one party to proceedings to be present at a meeting involving the judge without the other party being present. Ms O Connor, counsel for B, told me that M's mother was very anxious about M. She believes that M wants to see her father but does not believe that contact would be in M's interests. I said that if M's mother conceded that M

wants to see her father it would not be necessary for me to see M. I was then advised that it would be necessary for me to see M.

M is a lovely little girl with a gentle and quiet presence. She had drawn a picture of her family and, when I asked her about the people she had drawn, she identified her mother, herself, her uncle, S and her best friend, H.

I asked her was her daddy in the picture and she told me he was not; he was in gaol for doing bad things. I asked her if she had received anything from her daddy - letters or presents - and she was a little hesitant.

We then talked about school; she is at an integrated school as is her best friend H. We then talked about her reading books; she used to read about Biff and Chip but is now reading other books.

M then told me she would draw me other pictures. We looked again at the picture she had brought with her and I said I would like to keep that picture and write on it the names of the people. She pointed to mammy and I wrote down mammy; the next person she identified as daddy and I wrote down daddy; the next person was M and I wrote her name, M reminding me about how to spell her name and the next person was "H" M insisting that I correct my inaccurate spelling. I then wrote a title to the picture and asked M to sign it which she did.

I then asked M whether she wanted to get letters from her daddy and her answer was that she did. I then asked whether she wanted to see her daddy and her answer was a clear yes.

I did not ask M any further questions about her family.

I thanked her very much for coming to see me and she promised to draw more pictures for me.

The evidence

According to the statement of evidence, which was adopted in oral evidence by B, she and O were in a relationship for 6 years and separated in 2009 when S made the allegations against O.

B is resolutely opposed to any contact whatsoever between M and her father. She describes O as a "very dangerous man" who has not undergone any risk assessment

regarding contact with a female minor. She refers to the fact that he abused S until she was almost 15 and her belief is that, if contact was permitted between the applicant and M, there would be a real possibility that he would abuse the child. She also suggests that, if M were to have indirect contact with her father, she would become more curious about the reasons why he is in prison and would be adversely affected if she became aware of the nature of his criminal behaviour.

B outlined the present problems being experienced by S who has self-harmed and suffers from OCD. She had recently threatened further self-harm and is being referred back to CAMHS. S cannot bear to hug or look at M as she is reminded of M's father when she sees M. S was particularly upset when she became aware of the present proceedings.

There is a dispute in the evidence as to the contact between O and M after the allegations were made by S. According to O's statement of evidence, after he was charged on 29 May 2009, B permitted him to have regular telephone and letter contact with M and he sent her Christmas cards and presents in December 2009. B told him that she would not stop that contact. According to B "before the allegations ever came out (she) told (O) that if (they) separated she would not stop him seeing M; however once the allegations became known she feels very strongly that he should not have any contact"

B has exhibited to her statement of evidence a number of letters and cards written to M by her father and some letters to her. She says that she asked O not to send such communications and that she did not give them to M or read them to her as she felt they would upset her and lead her to question why her father was in prison. According to B the letters continued even after the no contact order made by the FPC in August 2010. It was on foot of these letters and a letter from a third party asking her to write to O that B made an application for a non-molestation order on 30 November 2010. On 28 February 2011 O signed undertakings which included an undertaking not to write to B or M without leave of the court.

B told the court that M was upset after meeting me on 2 June. She told her mother that I had asked her where her father was and had also asked her about sending a photograph to her father. I should make clear that I did ask M whether she had a school photograph which she could send to her father and she told me she had no school photograph and indeed no photograph of herself. I did not ask M where her father was; it was she who volunteered the information that he was in gaol for doing bad things.

The law on contact between a parent and a child

In deciding any contact case, the court must consider the following principles pursuant to the Children (NI) Order 1995

- (a) The principle of the child's welfare shall be the court's paramount consideration and the various factors set out in the Article 3(3) checklist must be applied. These include the ascertainable wishes and feelings of M in the light of her young age and stage of development.
- (b) The court must make no order unless to do so would be better for the child than not making an order
- (c) The court must recognise that any delay in determining any question with regard to this question of contact is likely to prejudice the welfare of the child. The avoidance of delay must be given a priority by the court.

I must also recognise that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and that domestic measures hindering such enjoyment do amount to an interference with the right to such protection under Article 8 of the ECHR.

I have found helpful the decision of Weatherup J in **MF v MF** [2003] NI Fam 10 in which he was considering an application for contact with two female children aged 9 and 6 by their father whom he was satisfied had abused sexually the 9 year old. The children were opposed to contact; their mother was hostile to contact; Dr Swann, an expert in child sexual abuse and its effects, had advised no contact; Mr Mc Mahon, family therapist, was opposed to contact particularly because the father had not acknowledged culpability.

Mr Justice Weatherup recorded the opinion of Mr Mc Mahon that "many children and their families can be helped by admissions of culpability from the perpetrator of abuse and even by ongoing contact with an abusing parent if the conditions of safety and security are met."

Mr Justice Weatherup, having found that one of the two children had suffered harm and that there was a risk of harm to both children, referred to the "presumption in favour of contact" and the "benefit to a family unit arising from contact with the father provided the children are safe and secure and the adverse effects of such contact do not outweigh the benefit so as to be contrary to the child's welfare". He noted the hostility of the mother to contact and the effect of that hostility on the children but stated that "it is not by (the mother's) hostility that the proper disposal of this case should be ascertained".

Decision

It is clear that the court must make an order in respect of M as there is no agreement between her parents as to her father's application for contact.

In deciding what order to make I turn to the Article 3(3) welfare checklist. I confirm that I have considered each of the factors in the checklist but do not propose to enumerate each of them. I have reviewed in particular the special needs of M given her ADHD and the proposed therapeutic intervention to address her behaviour. I have reflected on the question whether, if she were to have indirect contact with her father, M would suffer any harm by virtue of his criminal behaviour. I have found helpful the approach proposed by Wilson J in *Re M (Contact) (Welfare Test)* [1995] 1 FLR 274, 278-279 where he said

"I personally find it helpful to cast the principles into the framework of the checklist of considerations set out in Section 1(3) of the Children Act 1989 and to ask whether the fundamental emotional need of every child to have an enduring relationship with both his parents (s1(3)(b)) is outweighed by the depth of harm which, in the light, inter alia, of his wishes and feelings (s1(3)(a)) this child will at risk of suffering (s1(3)(e)) by virtue of a contact order."

There is no evidence before the court that M would suffer any harm from her father if she were to have indirect contact with him. I have taken account of the distress which would be engendered in S by knowing that the man who abused her is having indirect contact with her half-sibling; I have also considered the hostility which might well be felt by S towards M if she were to conclude that M's desire for contact with her father had been a factor leading to such contact. That hostility would have an adverse effect on M but the evidence before the court is that S is already negative in her attitude towards M who reminds her of O. In my view the adverse effect of an increase in the hostility of S towards M would not outweigh the benefit to M of maintaining a relationship with her father. I have also considered the concern of B that if M were to receive correspondence from her father she would want to know why her father is in prison and would be damaged if she learnt the nature of his criminal behaviour. It is in my view highly likely that M will, regardless of whether or not there is any contact between her father and her, become interested in due course about the reasons why her father is in prison. It cannot be said whether this likelihood will be increased by indirect contact. B may find it helpful to seek advice from the CAMS team who will be working with M as to when, how and by whom she should be told in an age appropriate way about her father's offending. I do not regard the risk that M will become curious about the nature of the offences

committed by her father sooner than she otherwise would have done as outweighing the benefit to her of having indirect contact with her father.

I have looked at the correspondence sent by O to M – correspondence which has not been seen by, or read to, the child. There are some points in some of the letters which could be confusing for M, for example, reference to the letters to O's sister, which are being held for M. However, the letters are in my view generally appropriate reflecting a positive attitude towards the child's mother and expressing love for, and interest in, M. I cite the following examples

“- Hi princess, hope you are keeping well and good for mummy. I miss you lots, kiss your photo every day and night

- Hi my princess number one, be good for mummy... daddy misses you lots, you can write me a letter

- Hi princess, daddy has to go away but I will keep in touch; you look after mummy. I hope mummy will let you ring me or write to me. Daddy will always love you and miss you. Be a good girl and do what mummy says

- Hi princess I hope you got my last letter ... not long till you get your summer holidays. I got photo of you from a good friend who had one of you... and I have it on my wall. You look great and growing up fast. I don't know what to do with your presents when it comes to Christmas and your birthday. So hope mummy will let you write to me and you can tell me where to send them I love you and miss you lots. Take care”

M is very young and does not understand the significance of the fact that her father is in prison. She has special needs by virtue of her ADHD. She also does not know why he is in prison and would be unlikely to understand the nature of his offending until she is much older. I therefore do not attach much weight to her wishes and feelings.

I have concluded that there should be indirect contact between O and M. I make an order that O be permitted to write to M once a month and to send her a present for Easter, for Christmas and for her birthday which falls in December each year. He shall be permitted to send M a present before the end of June 2011 to mark the end of her school year.

I know that M's mother will be disappointed by this decision but I expect her to help M to send a note thanking her father for his present to be sent this month and to write to him from time to time. M loves drawing and I am sure that she would draw a picture for her father from time to time which should be sent to O. I order

that B make available to her solicitor by 17 June a copy of M's school reports for primary 2 and for Christmas in primary 3 and an updated photograph of M - those reports to be sent by B's solicitor to solicitors for O by 24 June.

I emphasise that my consideration of the welfare checklist and my decision about contact between M and her father have been exclusively in the context of the fact that the application by O is for indirect contact. No inference should be drawn from my reasoning about indirect contact as to what would be the decision of the court if O were to seek direct contact with M.

I am considering whether to make an order under article 179 (14) that O shall not make any application to this court in respect of M without the leave of the court until he has been released from prison and will hear submissions about that.