Neutral Citation No: [2020] NIFam 27 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **KEE11361** *ICOS No:* **19/118812/A01** *Delivered:* **09/12/2020**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

BETWEEN:

CD

Appellant/mother;

-and-

EF

Respondent/father.

IN THE MATTER OF DON (A CHILD) (APPEAL: SERVICE OF PROCEEDINGS: VOICE OF THE CHILD)

Ms Lee Brown (instructed by Norman Shannon Solicitors) for the Appellant
Ms Melanie Rice (instructed by Bernard Campbell & Co Solicitors) for the Respondent

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KEEGAN J

Nothing should be published which would identify the child or the family. The name I have given to the child is not his real name.

Introduction

[1] This is an appeal from a decision of His Honour Judge Kinney ("the judge") sitting at the Family Care Centre in Belfast on 8 September 2020. It relates to a young boy who was born in 2010. The appellant is the child's mother who currently resides in the United States of America having emigrated in 2018. It is apparent that the child currently lives in Northern Ireland with the maternal grandparents. The respondent father is a Turkish national now living in the United Kingdom.

[2] The judge in reaching his decision provided a written judgment which sets out the reasons for making the orders which he did. These were a parental responsibility order in favour of the father and also an order for contact starting with indirect contact and moving up to direct contact to begin in December 2020 between father and child. The mother appeals these orders on the basis that the case

proceeded in her absence, that she was not properly served with any papers and that she disagrees with the orders made by the judge. As a result of the judge's ruling on 22 September 2020 the Registrar General effected a change of name on the birth certificate of the child to include the father. These proceedings were conducted by way of submissions by agreement of both counsel and I have also received helpful skeleton arguments from them.

Background

[3] As I have said this child was born in 2010 and has lived at the same address in Northern Ireland since that date. It appears that the parties had a relatively brief relationship having met on holiday in Turkey. After the relationship began it appears that the mother brought the child to see the father on a number of occasions in Turkey up until about 2015. The father says that indirect contact stopped after he met another person and began a new relationship. The father accepts that he sent some messages in anger in and around this time and that this was wrong. He states that the mother then blocked him on social media and calls to her were not connected. However, it appears that the father continued to try to maintain contact with the child through the mother and the mother's family. The father makes a case that he has sent considerable correspondence and also that he had a brief visit with the child in 2016 facilitated by the maternal grandfather at his house. The father was in Northern Ireland at this time with his partner on a visit visa. So the father's case is that since 2016 he has not had contact. He is now living in the United Kingdom and wants to maintain contact with his son and he effectively makes the case that he has been blocked by the mother.

[4] In her skeleton argument the mother says that she emigrated to the United States of America in 2018 and has married. She says that the child remained living in Northern Ireland with the maternal grandparents. She states that she was not aware of these proceedings and only became aware after she was told about the judgment and she also received a letter via the maternal grandparents in relation to the registration. The mother therefore seeks to have the orders of 8 September 2020 set aside and to have the matter remitted for a hearing afresh. She says that the father has sent abusive text messages which include threats to kill. The mother also makes the case that the welfare report directed by the court was not completed and therefore the voice of the child was not heard in the making of the orders in issue.

Chronology of court proceedings

[5]

(i) These began on 10 September 2019 when the father was acting as a litigant in person and he brought an application before Belfast Family Proceedings Court for contact. It is submitted that the address for service on the appellant mother was the address at which the father had last had contact with Don.

(ii) On 10 January 2020 the Family Proceedings Court directed a child welfare report.

(iii) On 7 February 2020 the Family Proceedings Court adjourned the case for an update from the Trust.

(iv) On 14 February 2020 the case was transferred to the Family Care Centre as the appellant mother had failed to engage in proceedings.

(v) On 18 March 2020 the case was listed for first directions in the Family Care Centre and it was adjourned to 21 April 2020 with a penal notice attached for the appellant mother to attend court.

(vi) Due to the pandemic the next listing of the case was an administrative listing on 15 July 2020 and the case was timetabled for hearing.

(vii) The case was heard on 8 September 2020 by which stage the father had legal representation and it is submitted to me that the case progressed by way of submissions only. The appellant mother had not engaged in the proceedings and was not present in court.

(viii) The maternal grandparents have now brought residence order proceedings which are before the lower court.

Consideration

[6] First, I have to decide whether or not the appeal time should be extended as it is three days beyond the time allowed. This was not strongly contested. I have considered the submissions made and in the circumstances I am prepared to extend the appeal time particularly as the mother was not present or represented at the hearing.

[7] Turning to the substantive matter, as all counsel have agreed I will apply the appellate test which emanates from the case of *Re B* which was heard in the Supreme Court and is reported at [2013] 2 FLR 1075. All counsel have agreed that this matter should be heard on submissions and the appellate test is whether or not the judge was wrong.

[8] So having considered the submissions there are essentially two questions for this court to decide. Firstly, was it appropriate to proceed in the absence of the mother? Secondly, was it appropriate to make the orders for contact and parental responsibility?

[9] In relation to service there are some issues that arise upon consideration of the Family Proceedings Rules (Northern Ireland) 1996. It must be borne in mind that the

applicant was initially a personal litigant. I am told by counsel that the procedure if an applicant is a personal litigant is the court usually write out to the respondent. I have not been provided with any of the correspondence in relation to this. Also I have not been provided with evidence that correspondence was returned by the maternal grandparents. In any event, in relation to service, various provisions of the Rules are important. Firstly, rule 4.92 provides for personal service or service by delivering it (a document) at or by sending it by first class post to his residence or last known address. Rule 4.96 provides that a document served by first class post shall be deemed to have been served on the second business day after posting, unless the contrary is proved. Rule 4.97 requires the applicant to file a statement in advance of the first directions appointment or hearing of proceedings confirming that service of the application has been effected on the respondent to the proceedings and that notice has been given under rule 4.54 and confirming the manner, date, time and place of service and the date, time and place of posting. Rule 4.54 and Appendix 3 column (iv) requires notice to be given of proceedings to persons who are caring for the child at the time when proceedings are commenced and to a person with whom the child has lived for at least three years prior to the application.

[10] Rule 4.17 sets out the requirements regarding attendance at any directions hearing or hearing. A party should attend at a directions appointment unless the court otherwise directs in compliance with Rule 4.17(1) subsection (2) provides that:

> "(2) Proceedings or any part of them shall take place in the absence of any party, including the child, if -
>
> (a) The court considers it in the interests of the child, having regard to the matters to be discussed or the evidence likely to be given, and
>
> (b) The party is represented by a guardian ad litem or solicitor;
>
> and when considering the interests of the child under sub-paragraph (a) the court shall give the guardian ad litem, the solicitor for the child and, if he is of sufficient understanding, the child an opportunity to make representations."

Subsection (4) sets out the circumstances in which the court can proceed in the absence of a respondent:

> "(4) The court shall not begin to hear an application in the absence of a respondent unless -

(a) It is proved to the satisfaction of the court that he received reasonable notice of the date of the hearing; or

(b) The court is satisfied that the circumstances of the case justify proceeding with the hearing."

[11] In light of the above it is clear that on the face of it there are some issues with adherence to the Rules. In particular there has not been an affidavit of service. However, it must be the case that in circumstances where personal litigants are involved that this may not always be filed. This is a breach of the Rules rather than the legislation. Also, whilst the judge in his judgment does not specifically reference rule 4.17 it does seem clear to me that the court was satisfied that the circumstances of the case justified proceeding with the hearing. The fact of the matter is this case had been before the court for some considerable time. It seems within the judge's discretion to determine that there was an evasion of service by the mother. The problem is that the grandparents who would be expected to react to this application did nothing. I find it highly suspicious that the grandparents did not on their case open any of the post in relation to these court hearings but yet were able to access the letter which included the judgment which triggered this appeal.

[12] So on balance I do not consider that the judge can be faulted in relation to proceeding in the absence of the mother given what he had heard about this case. There is a technical breach as there is no affidavit of service in compliance with the Rules. However, I do not believe that is fatal to the judge proceeding in all of the circumstances and particularly given that the applicant was a litigant in person at the initial stages. I would not be minded to allow this appeal on the basis of service alone.

[13] Notwithstanding the above, I do consider there is a more substantial issue which relates to the welfare assessment. This is the second question I have to answer. In particular, I bear in mind that this was a ten year old child who had not had contact for some time with his father and that a child welfare report was directed. In my view it is of significance that a welfare report was requested. I am very sympathetic to the judge who really was faced with a case where nothing was happening. I also consider that there is a valid argument that the mother was effectively trying to evade the father by her actions. But I do consider that some more effort should have been made to consider the case from the perspective of the child. Ms Brown raises the court's ability under section 33 of the Family Law Act 1986 to order any person to disclose relevant information relating to the child's whereabouts to the court. The fact of the matter is that this child has lived in Northern Ireland all his life, attends school in Northern Ireland and should have been able to be located.

[14] Accordingly, I consider that this judgment and the orders need to be revisited on the basis that the position of the child was not before the court. I say this

particularly as the judge provided for an extension of contact from indirect to direct contact in a case where the father has not had contact for some five years. I am also of the view that it is appropriate to remit this matter for a rehearing particularly given that the grandparents have now brought a residence order application. There is no prejudice at all to doing this given that all parties will be engaged in residence proceedings. In those proceedings the court will be able to fully assess the welfare needs of this child applying the welfare checklist and taking on board the views of all parties. During those proceedings the conduct of both parties will be assessed and no doubt there will be an examination of the service issue by the maternal family which may indicate a certain mind set. It is now best to look at this case in the round. Fundamentally, these cases depend on a welfare assessment as that is the paramount concern and I trust that that will now form the focus of this case.