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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

Between:

A MOTHER

Applicant

-v-

A FATHER

Respondent

IN THE MATTER OF RE (A FEMALE CHILD AGED 5 YEARS)

Moira Smyth QC with Ashley McCausland BL (instructed by John McCaffrey & Co solicitors) for the mother

Suzanne Simpson QC with Colin Gervin BL (instructed by Fox Law solicitors) for the father

McFARLAND J

Introduction

[1] This is an application by the mother under Article 7 (3A) of the Children (NI) Order 1995 for the court to order that the father should cease to bear parental responsibility for their child. (I will refer to the Children (NI) Order 1995 as “the 1995 Order” and any reference to an Article will be an Article of the 1995 Order.) This judgment has been anonymised to protect the identity of the child. I have used the cipher RE for the name of the child. These are not her initials and has been chosen randomly. Nothing can be published that will identify RE.

Background

[2] RE was born in the Spring of 2016. The mother and father are not married, but as the father was registered as the father on RE’s birth certificate he acquired

parental responsibility for her (see Articles 5(2)(a) and 7(1)(a)). Parental responsibility is defined as “*all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property*” (Article 6).

[3] The mother and father had been living as a couple for several years from in or about 2014. There was a serious incident in September 2016 when RE was 4 months old and the mother was 8 weeks pregnant with the couple’s second child. The father is not named on the birth certificate of the second child and does not have parental responsibility for that child.

[4] In January 2018 the father pleaded guilty at Dungannon Crown Court to offences of causing the mother to engage in sexual activity and a common assault on her. He had faced more serious charges including false imprisonment and rape and whilst it is difficult to understand the rationale behind the convictions it is clear that the pleas were entered on the basis of a compromise with the prosecution. The events involved non-consensual activity and sexual penetration and the sentence of four years (two years custodial term and two years licence) is more on a par with a rape conviction.

[5] The offences arose in a single incident and occurred in the couple’s bedroom in the presence of RE.

[6] The sentence also involved the imposition of a Sexual Offences Prevention Order (“SOPO”) until 24 January 2025. This prevents contact with the mother, save for indirect contact in the context of any family court proceedings in relation to RE and the couple’s other child who was born in the Spring of 2017. Notification requirements under the Sexual Offences Act 2003 also apply to the father for an indefinite period. The father remained in prison until 14 February 2019 (having spent a significant period in custody on remand). His licence period expired on the 14 February 2021.

[7] The mother has applied for the order because of what she describes as the enduring impact of the offending on her and her family life. She considers that any requirement that the father receives information, and for him to be involved in decision making, about RE, would re-traumatise her. She is currently living at a confidential address and fears that any information about RE could reveal that address. She also fears a random meeting with the father and has referred the court to one such incident. She has also referred to drug misuse and general controlling behaviour on the part of the father.

The Law

[8] McAlinden J in *Re DD* [2019] NI Fam 17 referred to the relevant English authorities at [20] of his judgment and at [21] set out the four broad situations when the court can consider applications of this type – cases involving the sexual assault of the child or sibling; cases involving the inflicting of serious injuries to the child or

sibling; cases involving domestic abuse of the parent of the child; and cases involving significant criminal behaviour to others outside the family. This case falls into the third category.

[9] At [23] various propositions were set out, and I am content to adopt them as a statement of the legal approach to this type of application:

“(a) The concept of parental responsibility describes an adult’s responsibility to secure the welfare of the subject child which is to be exercised for the benefit of the child not the adult;

(b) When the court is considering an application for termination of parental responsibility, the child’s welfare will be the court’s paramount consideration;

(c) The paramouncy test is overarching and no one factor that the court might consider in a welfare analysis has any hypothetical priority;

(d) There is ample case-law describing the imperative in favour of a continuing relationship between both parents and a child so that ordinarily a child’s upbringing should be provided by both parents and where that is not in the child’s interests by one of them with the child having the benefit of a meaningful relationship with both;

(e) Where the court has applied the concept of the paramouncy of welfare, the court will have identified the correct principle to apply. If the Court analyses welfare by reference to the welfare checklist, the court will have provided itself with an appropriate analytical framework against which to provide reasons for its decision. However, the Court may look at other potentially relevant factors such as parenthood, commitment, attachment and motive so long as the court does not raise any one or more of these factors to the status of a competing presumption or test by which the application is determined;

(f) The court must have regard to the fact that the removal of parental responsibility or indeed the refusal to make such an order clearly involves an interference with Article 8 rights of one or more of the individuals at the heart of the case and, therefore, any such interference must be in accordance with the law, necessary and proportionate in the sense that the court must take the most proportionate route to a welfare resolution which is consistent with the best interests of the child concerned;

(g) *The test by which to judge proportionality is as described by Lord Reed in Bank Mellat [2013] UKSC 39. The Judge has to consider:*

- (i) *whether the objective of the measure is sufficiently important to justify the limitation of a protected right;*
- (ii) *whether the measure is rationally connected to the objective;*
- (iii) *whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and*
- (iv) *whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."*

[10] It is also important to bear in mind several other factors. Firstly, parental responsibility does not equate to parentage. Removal of parental responsibility does not remove parentage and it does not prevent a parent applying for, and having contact, with the child. Secondly, the court can limit the extent to which a parent can exercise parental responsibility (see Article 5(7), Article 8(1) and *Re B & C* [2017] EWHC 3250). Thirdly, the court can regulate how a parent accesses the family courts under Article 179(14).

[11] Emphasis is also placed by the courts on the desirability that parental responsibility should not be removed unless there is a good reason. In *Hale J in Re M* [1995] Lexis Citation 1203 stated that:

"parental responsibility is to be encouraged and ... should not be revoked without very good reason to do so."

and *Singer J in Re P* [1995] 1 FLR 1048 at 1052 added:

"I start from the proposition that parental responsibility – both wanting to have it and its exercise – is a laudable desire which is to be encouraged rather than rebuffed. So that I think one can postulate as a first principle that parental responsibility once obtained should not be terminated in the case of a non-marital father on less than solid grounds, with a presumption for continuance rather than termination."

[12] As this is the mother's application, the burden is on her to show, on the balance of probabilities, that parental responsibility should be removed. The

proposition set out by Hale and Singer JJ does not enhance the standard of proof placed on the mother. It does, however, mean that when the court is conducting the usual proportionality test, the weight afforded to the desirability of a continuance of parental responsibility will be given greater weight.

The proceedings and hearing

[13] The application came before the court by C1 dated 13 May 2021. The full history of the proceedings is that the father applied for a declaration of parentage of the younger child and a contact order with both children on the 15 January 2020. The mother then issued a C2 on 3 February 2021 seeking an order under Article 7(3A). The father subsequently sought leave to withdraw his applications. As a consequence, the mother's C2 application, being ancillary to the father's C1 application, could have lapsed and the fresh C1 application was made to bring the matter formally before the court.

[14] The hearing was conducted on the 6th September 2021 and proceeded by way of submissions only. Both parents had made statements but no oral evidence was received.

Consideration

[15] The court will always approach decisions such as this bearing in mind the paramountcy of the welfare of RE.

[16] The mother's case relies primarily on the severity of the sexual and physical assault against her in September 2016. She also raises the issue of risk of harm to both children.

[17] The incident in September 2016 was particularly serious. If she has to share parental responsibility it will inevitably require contact and discussions with the father when dealing with issues such as medical care, schooling and other matters. These would also include an Irish passport application, a matter specifically raised by the mother, although it is a factor with very modest implications for the welfare of the child. Her case is that any contact with the father has the potential to impact on the mother's mental health and could undermine her ability to care for RE.

[18] The mother states that she is 'terrified' of the father and reports a chance meeting with him when she was so disturbed to the point of bladder incontinence. This is self-reported and there is no corroborative evidence and, in particular, no confirmation of any diagnosis concerning her mental health. Her GP was asked to provide a report but declined to do so stating that he lacked the expertise. This is despite the fact the GP had only been asked to report on the impact of the September 2016 incident on the mother, her current mental and emotional health, and any diagnosis and medication prescribed. A simple provision of the GP notes and records would have sufficed to clarify what consultations had taken place and what,

if any, medication had been prescribed.

[19] A social worker and cognitive behavioural therapist attached to the local Trust's Family Centre met the mother on two occasions but declined to provide therapy as the social worker *"felt that [the mother's] symptoms were indicative of Post-Traumatic Stress Disorder."* She advised the mother to go to her GP to get re-referred. (There is no evidence that the mother took this further and references in the report referred to in [20] below, infer that she did not.) There is no confirmation that this is an accurate diagnosis, and is only expressed as a feeling of the social worker as opposed to an opinion. It is also uncertain whether the social worker is qualified to make such a diagnosis.

[20] I accept that it was a harrowing incident experienced by the mother. It took place over 5 years ago. The report of the Trust's Family Intervention Service prepared for the court did express concerns in relation to the mother's mental health should the father continue to be a physical presence in her life. To this end the recommendation was that there should be no direct contact between the father and the child at this stage but that contact could be explored in a year's time, when *"it can then be re-assessed if the children can have a safe relationship with their father, one that will not potentially damage their mother's mental health."*

[21] The father asserts that the mother's application and the earlier C2 were purely re-active to his applications, and largely tactical on the mother's part. The child was approaching her fourth birthday before it was made, and then over a year after the father had commenced proceedings for contact with the child. At no stage has he ever sought to exercise his parental responsibility, and has been unable to exercise the responsibilities that flow from that as the mother has never sought to involve him in the decision making for the child.

[22] The father also asserts that he has recognised the difficulties with the present situation and has decided not to proceed with his contact applications. He says that this indicates a responsible attitude towards both children and the mother. He states he is remorseful for his past conduct and he has served his punishment, which has included a period on licence when he did not come to any adverse attention of the Probation Board or others. He has shown that he can live in the community under a strict regime of safeguarding measures including prevention orders, supervision and notification requirements and fully comply.

[23] He is also enjoying direct contact with a younger step-brother of RE, this contact being supervised.

[24] Counsel have referred me to several cases, but the case-law for this particular type of application is very fact specific. The only case with similar facts is the judgment of Roderic Wood J in *Re A* [2013] EWHC 2963 a case involving proven coercive control, with convictions for two physical assaults on the mother over several years, the latter being witnessed by the couple's 4 year old daughter. The

court did terminate the father's parental responsibility stating that the mother had "*effortlessly traversed the high threshold required*" (paragraph [26]), however it is noteworthy that the father did not appear and was not represented, having previously indicated a willingness to give up parental responsibility but failed to provide a formal document to that end.

[25] The mother has not shown that the child would be in anyway directly adversely impacted by the father exercising parental authority. The impact could arise indirectly from a potential de-stabilising of the mother's mental health and a consequential deterioration in her ability to parent the child in her role as the primary, and sole carer. The absence of evidence concerning her mental health makes it difficult for the court to analyse this in detail.

[26] The Family Intervention Team were clearly of the view that this could be managed with the passage of time, with suitable supervision and with the mother seeking medical assistance.

[27] Lord Reid in *Bank Mellat* spoke of consideration of less intrusive measures. There is already in place the provision of the SOPO for another 4 years. The notification requirements are in place until further order meaning that the police will be able maintain an awareness of where the father is living.

[28] To assuage the concerns of the mother about direct contact between her and the father (notwithstanding that it is forbidden by the SOPO), the court would be at liberty to order that the father does not exercise any rights, duties, powers, responsibilities and authority of parental responsibility currently vested in him. In addition an Article 179(14) order prohibiting the making of any application without leave of the court will restrict court involvement.

[29] I consider the existing and proposed orders will provide the mother space to enable her to parent the child and to take more steps towards her recovery.

[30] The Family Intervention Team's speak of a pause of one year in the contact application, and there is much to commend this suggestion.

[31] In the circumstances, I am not satisfied that the mother has shown that it is proportionate to terminate the father's parental responsibility for the child. Her application is therefore dismissed.

[32] I make a prohibited steps order under Article 8 prohibiting the father from taking any steps in the exercise of any aspect of his parental responsibility for the child for a period of one year.

[33] I make a further order under Article 179(14) that the father shall not make an application under the 1995 Order in respect of the child without the leave of the court, again for a period of one year.

[34] Both periods are to run until 15 September 2022.

[35] Leave is granted to the father to withdraw his applications and they are formally dismissed on a without prejudice basis with no order.

[36] There will be no order as to costs in both actions between the parties but there will be a taxation order in respect of any legally assisted parties.