



Child & Family Law Update

Issue 44

Winter 2019



Including details of

- cases
- legislation
- and general information

Child & Family Law Update

Welcome to the Winter 2019 edition of the Child & Family Law Update.

The Update is designed to keep lawyers, medical practitioners, social workers, advice workers and others involved in the field of child and family law up-to-date with legal developments. In addition to case notes, the Update contains articles on topical issues relating to children and families that will assist professionals across a range of disciplines discharge their responsibilities. Articles and case notes are written by practising professionals and academics.

The Editor would welcome comments on any of the articles which appear in this issue or articles for future issues.

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THE VOICE OF THE CHILD

Kathryn Mullan, LL.B. LL.M, Solicitor¹

“Much unhappiness has come into the world because of bewilderment and things left unsaid” - Fyodor Dostoevsky

Children have rights and these rights are a well-established feature of the legal landscape. The United Nations Convention on the Rights of the Child (“the Convention”) has been effective since the 2nd September 1990 with 140 signatories. It is a human rights treaty and the principle international instrument defining children’s rights. Whilst it has been ratified by the United Kingdom it is not currently binding in Northern Ireland Courts.

The Rights enshrined reflect the ethos of the Convention that the parent, the Court or the local authority are expected to have the welfare of the child as their primary concern.

Article 3 of the Convention requires that in all actions concerning children, where they are undertaken by public or private social institutions, Courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. Article 12 requires that the child who is capable of forming his or her own views is assured the right to express these views freely in all matters affecting the child, the view of the child being given due weight in accordance with the age and maturity of the child. In particular this must include the opportunity to ***be heard*** in any judicial and administrative proceedings affecting the child.

Baroness Hale in the Hague Convention case of *Re:D (a child)(Abduction;Foreign Custody Rights (2006) UK HL 51* asserted that -

“The principle of hearing the child unless it appears inappropriate having regard to his age and degree of maturity is of universal application and consistent with international obligations under Article 12 of the United Nations Convention on the Rights of the Child. There is a growing understanding of the importance of listening to the children involved in children’s cases as it is the child more than anyone else who will have to live with the decision of the Court.”

The Children (Northern Ireland) Order 1995 (“the Children Order”)² is our primary legislation governing both private and public law proceedings. It provides a balance between the parties, children and the state. Article 3 most commonly referred to as the “Welfare Checklist” states that a child’s ascertainable wishes and feelings (in light of their age and understanding) is one of the factors which a Court must have regard too. The needs and voices of the child should be heard and respected.

It is the children who have to live with the decisions which the Court makes both presently and in the future. Therefore, decisions which impact on the children’s lives should not be made without an awareness and understanding of how the children themselves will respond. Many children who have experienced being involved in family proceedings have indicated that they felt that the proceedings were ‘happening’ to them and that they felt excluded, powerless

¹ John Boston and Company.

² 1995 NI 2

to influence, contribute to or even to make their voice 'heard' at all. Involving children in the decision making process can, however, be inherently problematic and gives rise to further questions such as "at what stage and in what circumstances *should* children be involved?" and "how do we give them a voice?". The United Nations Committee on the Rights of the Child has emphasised that a child is an active subject of rights, and thus where a child is old enough to express his or her views; he or she should be encouraged to do so directly as an active participant rather than through an intermediary.

The procedural rules within our jurisdiction of Northern Ireland have left professionals to communicate with the child and pass on that communication to the court.

In private law cases, it is the parents who articulate the views of the children through their Solicitors and very often these are not the real views of the children. At the direction of the Court or at the request of the parents, the Court Children's Officer can become involved and this is the most common way in which a child is heard. The Court Children's Officer will speak with both parents and the child if they are old enough, and will provide an oral or written report for the Court on the child's wishes and feelings. They will usually make recommendations about the children's future arrangements based upon what they have seen or heard.

In public law cases, the Court will hear the thoughts and views of children through the Guardian Ad Litem who is appointed independently.

Article 60 of the Children Order states that for the purposes of specified proceedings, the Court shall appoint a Guardian Ad Litem for the child concerned unless satisfied that it is not necessary to do so in order to safeguard his interests.

In *Re J [2002] NIFAM 17*, Gillen LJ emphasised the importance of children being seen and heard in child cases and referred to the possibility of an increased use of Guardian Ad Litem in private law cases as very often it is the parent's views that are being articulated and portrayed as the true views of the child.

What is a Guardian Ad Litem and the Solicitors role?

The Guardian Ad Litem is an independent officer of the Court appointed by the Northern Ireland Guardian Ad Litem Agency (NIGALA). They represent the child in public law proceedings and in private law proceedings if an art. 56 investigation is directed by the Court. Their role is to speak to the child and advise the Court of the wishes and feelings of the child. The Guardian Ad Litem represents and safeguards a child's interests. They will thoroughly investigate the child's circumstances and provide a recommendation to the Court.

Rule 12(2) of the Magistrates Court (Children (Northern Ireland) Order 1995) Rules (Northern Ireland)1996³ states that a Guardian Ad Litem shall:

- (a) appoint a Solicitor to represent the child, unless a Solicitor has been appointed; and
- (b) give such advice to the child as is appropriate having regard to his understanding and, subject to r. 13(1)(a), instruct the solicitor representing the child on all matters relevant to the interests of the child, including possibilities for appeal, arising in the course of the proceedings.

³ 1996 SR 323

A Solicitor is appointed to essentially work alongside and in partnership with the Guardian Ad Litem to promote the interests of the child and advise the Court on the child's wishes and feelings. The Guardian Ad Litem and the Solicitor must try to achieve the best possible outcome for the child in the circumstances. This can sometimes be difficult as the role of the Solicitor is to balance the child's rights and wishes with their responsibility to keep the child free from harm which can include both physical and emotional harm.

A Solicitor appointed under a. 60(3) of the Children Order and in accordance with r. 4.12(2) (a) of the Family Proceedings Rules (Northern Ireland) 1996⁴ shall represent the child. The Solicitor appointed shall represent the child in accordance with instructions received from the Guardian Ad Litem **unless**:

- the Solicitor considers, having taken into account the views of the Guardian Ad Litem and any direction of the Court under Rule 4.12, that the child wishes to give instructions which conflict with those of the Guardian Ad Litem;
- and the child is able having regard to his understanding to give such instructions on his own behalf;
- in which case the Solicitor shall conduct the proceedings in accordance with the instructions received from the child.

How do the Guardian Ad Litem and the Solicitor work for a child?

The Guardian Ad Litem and the Solicitor meet with the child during the Court proceedings. Their role is to ascertain the following:

1. The child's wishes and feelings in respect of any matter relevant to the proceedings including their attendance at Court (r. 4.12 5(b) Family Proceedings (NI) Rules 1996).
2. Whether or not the child is competent to communicate their wishes and feelings and their understanding of their circumstances which have led to the proceedings before the Court.

In addressing the above issues, the Guardian Ad Litem and the Solicitor will reference the "Welfare Checklist" as contained within art. 3(a)(b)(c)(d) of the Children Order.

In advance of the initial meeting with the child, the Solicitor will have spoken with the Guardian Ad Litem and been told the age and development stage of the child, the child's experiences to date, the child's emotional and psychological state, the external influences on the child, cultural issues with the child and any communication issues. The child should receive an explanation as to the Solicitor's role, the nature of and the reasons for the Proceedings, what will occur at Court and the views of any Social Workers or experts involved in the case.

What happens after the Guardian Ad Litem and the Solicitor have met with the child?

The Guardian Ad Litem will provide an initial analysis report which will provide a brief summary of the issues surrounding the case and the impact these issues have on the child. The Guardian Ad Litem will look at the "*child's world*" and their perspective considering the impact upon them of their lived experience, such as the child's experience of caregiving, their experience of the caregiving environment, the impact upon the child of exposure to harmful/

⁴ 1996 SR 322

dangerous adults, the experience and impact upon the child of unpredictable/inconsistent/unavailable parenting and disruptive and neglectful parenting.

In dealing with the child, the Guardian Ad Litem and the Solicitor must always be mindful of the child's competency to give instructions. The extent to which the child's decisions are upheld as if they were an adult depends on a number of factors, such as the child's age and understanding, as well as the matter in issue and the severity of the consequences of the decision (*Gillick v West Norfolk & Wisbeth Area Health Authority [1986] 1 AC 112*). The ruling in *Gillick* provides that a child's voice is listened to in Court when they reach a sufficient understanding to be capable

It is generally accepted that the competent child should be able to communicate their wishes and feelings, views on the background events leading to the proceedings, have a perception of the reasons as to why they are in care and a perception of the length of time of their stay in care. It is important to remember that it is possible for a child to be competent about some issues but not others and the age of the child, whilst relevant, is not conclusive of competence in itself. The establishment of competency is extremely important and must be kept under review throughout the proceedings.

The case of *Re S (a Minor)(Independent Representation) 1993 2 FLR 347* cautions that understanding is not an absolute in assessing competency. It has to be assessed relative to the issues in the proceedings, and where any sound judgement on the issues calls for insight and recognition which only maturity and experience can bring, both the Court and the Solicitor must be slow to conclude that the child's understanding is sufficient. A further consideration is the need to factor in trauma, anger, mistrust, stress and pressure from others, all of which will impact upon the child's understanding.

The Child's voice and their expectations

The child is automatically a party to the proceedings and whilst they are not physically visible in Court, the case centres upon the child and it is their life which is effected by the decisions of the Court. Many children feel frustrated and let down that decisions are being made about their life in which they have no say, therefore it is extremely important that their views are taken seriously and afforded due weight.

From discussions between the Northern Ireland Guardian Ad Litem Agency and children that have been involved in Court proceedings the following expectations were highlighted by those children;

- I should always be at the centre of everything during the care proceedings;
- My needs, wishes and feelings must be considered at every stage of the process;
- Judges need to listen and hear from me directly, in person or by letter;
- It is always best for the Judge to hear the powerful feelings included within my own words;
- I have to be able to build a trusting relationship with my Guardian to help me talk about my most private and painful wishes and feelings;
- It is most important that my words are not changed when the Guardian and Solicitor are explaining my wishes and feelings to help the Court understand my life.

LJ Gillen in his Review of Family Justice in Northern Ireland, which was published in September 2017, addressed the importance of the “*voice of the child*” being heard and indicated that even the youngest child’s rights must be respected. He further commented that there has been a reluctance by the Judiciary to see children in private, however, increasingly the trend in Northern Ireland and the Republic of Ireland has been to conduct interviews by the Judge with the children directly.

LJ Gillen identified five main advantages in meeting with the child:

1. The Judge will see the child as a real person rather than the object of other people’s disputes or concerns. Children may have a very clear idea about what they think is right;
2. The Court may learn more about the child’s wishes and feelings than is possible at second or third hand;
3. The child will feel respected, valued and involved as long as the child is not coerced or obliged to make choices that they do not wish to make;
4. There is a need to make the child feel that he or she has participated in the process of deciding his or her own fate;
5. It represents an opportunity to help the child understand the rules. Just as the parents will have to obey the Court Order, whether they agree with it or not, so will the child. Hopefully, a child who has been involved in the process may feel more inclined to comply with the decision than one who feels they have been ignored.

LJ Gillen further highlighted the benefits of a child meeting with a Judge in the case of *Fergus v Marcail* [2017] NICA 71, however whilst it can be advantageous for such a meeting to take place, it does not mean that it occurs as a matter of routine. It is something which should remain within the discretion of the Judge as to whether he or she considers it appropriate but it should be carefully considered throughout the course of the Proceedings.

In addition to meeting with a Judge, the communication and explanation of a Court’s decision can also be of crucial importance in helping the child understand and come to terms with the outcome. In the case of *Re A (Letter to a Young Person)* [2017] EWFC 48, the Judge delivered his judgment in the form of a letter to the child who was 14 years old at the time. This case highlighted the current sentiment as regards inclusiveness of a child in decisions relating to their own upbringing and accessibility for that child of any decision of the Court.

It is evident that there is a real desire by children to have their voices heard and be directly involved in the decision making process. The welfare of the child is the paramount consideration in all cases and the principal driver of decisions concerning the child. There is no one formula, or course of action which can guarantee a child’s best interests, nor is there an interpretation of that best interest which can protect all children all of the time. Each case is intrinsically different and the focus should be on a shift towards a more child inclusive process to ensure that the voice of the child is heard.

Children’s rights are articulated by the United Nations Convention on the Rights of the Child and to be of real value to children and ensure that their voice is heard, our domestic legislation should be interpreted in a manner consistent with the UNCRC and the European Convention of Human Rights so that children can rely upon these international instruments in seeking to enforce their fundamental rights.

**NON-MOLESTATION ORDERS:
GUIDANCE ON PROCEDURE IN LIGHT OF THE GROWING ISSUE OF DOMESTIC
VIOLENCE**

Amy Kinney, Barrister at Law

Non-molestation Orders are a protective measure for those who fall victim to the breakdown of a close family relationship. The breakdown of that relationship is laden with such high emotion that it can lead to intense reactions and unreasonable behaviour. This is where the Family Courts step in. Molestation, harassment and violence within the family relationship are governed by the Family Homes and Domestic Violence (Northern Ireland) Order 1998 ('the 1998 Order')¹.

Non-molestation Orders are similar to Protection from Harassment Injunctions; their purpose is to protect an applicant from further abuse or harassment. However, the main distinguishing feature is that only specified people can bring an application for a non-molestation order. To apply for a non-molestation order you must be an "associated person". The definition of an associated person is set out in Article 3 of the 1998 Order. Some examples of persons who meet the definition of an associated person include a spouse, a cohabitee, a relative or a relevant child. Article 3 (2) considers the meaning of relevant child.

The legislative framework is contained in Article 20 of the 1998 Order. Pursuant to Article 20 (1) an order can prohibit the molestation of either, or both, an associated person of the respondent or a relevant child. Molestation is a wide and imprecise term. There is no legal definition. The Shorter Oxford English Dictionary defines it as "to cause trouble; to vex; to annoy; to put to inconvenience". Although physical violence or threats of violence are not necessarily required it is clear that if these are present in the case it will amount to molestation. In *C v C* [2001] EWCA Civ 1625 Lady Justice Hale (as she then was) stated that an order could be justified where the conduct of the respondent was "calculated to cause alarm and distress" to the applicant. Case law concludes that molestation is conduct amounting to such a degree of harassment as to require the intervention of the court. Ultimately, Judges should consider whether conduct amounts to molestation on a day by day, case by case basis.

A court shall consider all the circumstances when deciding whether to grant an order including the "*need to secure the health, safety and well-being of the applicant or any relevant child*" (Article 20(3)). The legislation is not prescriptive as to the interpretation of health, safety and well-being and a broad scope can be applied to this test.

If the court decides to grant an order it will usually prohibit conduct extending to intimidation, harassment, pestering and using or threatening violence. The order can also contain provisions prohibiting the respondent from instructing, encouraging or in any way suggesting that another person should act in the prescribed manner. Under Article 2(2) of the 1998 Order "molest" is defined to include inciting, procuring or assisting any person to molest. The duration of the order can be a specified period or until further order. If a full order is granted the usual duration is 12 months. In cases where an ex parte has been granted, the length of time the applicant has benefitted from such an order will usually be considered when deciding the duration of a final order. A Judge may also consider if there are allegations that the ex parte order has been breached.

¹ 1998 NI 6

Ex Parte Applications

Proceedings should be commenced on a Form F1² supported by a statement which is signed and declared to be true by the Applicant or, with the leave of the court, by oral evidence. A draft summons should also be lodged in Form F2.

If an applicant seeks to make an application without notice being given to the Respondent, they must apply for leave of the court to make the application ex parte. Ex parte applications are common in current practice. For a period of time they have been granted without much difficulty. This is despite case law such as *RH and others v IH* [2009] NIFam 17. Stephens LJ referred to the case of *Wallace v Kennedy* [2003] NICA 25 and said that ex parte orders should be “the exception rather than the rule”.

Article 23 (2) of the 1998 Order sets out the factors a court should consider in determining whether to exercise its power to grant an ex parte order.

- (a) any risk of **significant harm**³ to the applicant or a relevant child, attributable to conduct of the respondent, if the order is not made immediately
- (b) whether it is likely that the applicant will be deterred or prevented from pursuing the application if an order is not made immediately, and
- (c) whether there is reason to believe that the respondent is aware of the proceedings but is deliberately evading service and that the applicant or a relevant child will be seriously prejudiced by the delay involved-
 - (i) where the court is a court of summary jurisdiction, in effecting service of proceedings, or
 - (ii) in any other case, in effecting substituted service.

Further guidance relating to ex parte applications is provided by case law. There are two circumstances where ex parte orders should be made. The first is when there is no time to give the respondent notice to appear. The second is when there is reason to believe that the respondent, if given notice, would take action which would defeat the purpose of the order (*Loseby v Newman* [1995] 2 FLR 754).

In *RH and others v IH*, Stephens LJ gave guidance that when arguing the latter circumstance, it is not enough for the applicant to simply state that they are making the application ex parte as they are fearful of what the respondent might do if he was given notice without a protective order already in place. He said that the applicant should provide evidence of the reasons they believe the respondent would take such action as to defeat the purpose of the order. In that case there were “insufficient details and particulars to justify bringing the application ex parte”. Stephens LJ emphasised the importance of full and frank disclosure of all the relevant and material facts at the hearing of the ex parte application.

At the hearing of an ex parte order the applicant’s grounding statement is sworn as her evidence supporting the application. Sometimes the solicitor or counsel will indicate that the applicant seeks to add to her statement by way of oral evidence, this requires the leave of the court. Oral evidence at an ex parte hearing could give rise to an evidential problem. The oral evidence is not included in the papers served on the respondent. They are therefore not

² Pursuant to r.6 and Sch 6 Magistrates Court (Domestic Proceedings) Amendment Rules (NI) 1999 SR 62

³ Writer’s emphasis

fully served with the case that was made out against them. A way to avoid this issue would be to follow the suggestion of DJ Meehan in *H v W* [2017] NIMag 1 in which he proposes an alternative to oral evidence by way of an amendment to the paperwork to include what the applicant seeks to give oral evidence on. Some Judges may hear oral evidence in support of an application. In those circumstances the court could be asked to amend the original statement to include the contents or gist of any oral evidence heard. The courts must give thought to the respondent's right to a fair hearing. A respondent is entitled to know the case against them to enable them to challenge this case. A distinction may be drawn between expanding on incidents within the grounding statement, which is detail that arguably could have and should have been included in the statement without the need for amendment and outlining further incidents that have occurred after the papers have been lodged with the court.

Ultimately the test for whether an ex parte order should be made will be whether there is a risk of significant harm to an applicant or relevant child at the hands of the respondent if an order is not made immediately. This is a relatively high threshold. It is common practice for ex parte application's to be made within 7 days of an incident of molestation. Any longer than this and it may be found that the need for protection is not urgent and there is time for an inter partes hearing to take place.

If an ex parte order is made it should be brought back to court for an inter partes hearing expeditiously. In England guidance was provided by the President of the Family Division, Sir Andrew McFarlane on 14 October 2014, to say that "*without notice orders should not normally last for more than 14 days in the first instance and that the respondent's request for a hearing to dispute the order should be heard as a matter of urgency*". Case law in Northern Ireland suggests that a full hearing should be listed "as soon as just and convenient" (*Wallace v Kennedy* [2003] NICA 25). However, in practice the first inter partes hearing tends to be within a month of the ex parte application. The time between the granting of an ex parte order and an inter partes hearing reflects the time the Respondent has an order against them before they have had the opportunity to challenge the evidence grounding the order. A non-molestation order essentially puts a condition on the respondent's liberty. The scope of such an order should not be underestimated.

In the event an ex parte order is not granted, the matter should be listed for inter partes hearing as soon as practicable. Even if a case does not meet the ex parte test this does not mean that the applicant is not at some risk. If an applicant does not have an ex parte order in their favour and the respondent is served with a summons along with the grounding statement (which usually includes allegations) it is in the applicant's interest to have the inter partes hearing before the court as soon as possible. This would be to try and avoid any further incidents or any negative reaction of the respondent. It would allow the applicant to fight their case for a full non-molestation order at inter partes hearing where the test is significantly lower and receive the protection of an order without unnecessary delay.

Regardless of whether there is an interim order in place or not, there may be practical difficulties in shortening the time between an ex parte application and the first inter partes hearing. A respondent may not be able to instruct legal representation and secure legal aid within 4 weeks, especially if the summons is not served on them immediately. It is often the case that at a first inter partes an adjournment is required which inevitably leads to delay in the movement and progress of the applicant's application.

Substantive Hearings

When a non-molestation application is listed for full hearing the court usually requires oral evidence. There are nearly always factual disputes resulting in the need to hear from the parties. Commonly it is one party's word against another meaning that credibility plays a key role when the Judge decides whose evidence to accept. Not all cases will run in front of a Judge, a lot of cases resolve outside of court on foot of undertakings. Unlike undertakings in a civil harassment injunction, undertakings in a non-molestation case are not made an order of court. The Judge does not have sight of the undertakings and a breach of same will not amount to contempt of court. They do not carry the same criminal sanctions a full order does, and the respondent is essentially agreeing to refrain from doing something that they shouldn't be doing anyway. The main advantage of undertakings, from an applicant's point of view, is that they leave court with some form of protection. The risk of going into court and the Judge not granting an order is taken away. It is also common that an applicant in a non-molestation case does not want to have to give evidence or be cross-examined about an incident of molestation, especially when the alleged perpetrator is sitting in the same court room. Unlike in criminal courts, where special measures protecting an alleged injured party are used frequently, there is limited remit for special measures in the Domestic Proceedings Court. The other advantage to undertakings is that if the matter is brought before the court again following a subsequent incident the respondent may find it difficult to persuade the Judge that a full non-molestation order is not required.

Minor Applicants

If a child who is under the age of 18 wishes to bring a non-molestation application in their own right, then proceedings should be commenced in the Office of Care and Protection in the High Court. This is pursuant to Article 4(4) of the Family Homes and Domestic Violence (Allocation of Proceedings) Order (Northern Ireland) 1999. It is important to note that this is only if it is the child who is bringing the proceedings. A distinction should be drawn between a child seeking the protection of the court and a parent seeking the protection of the court for a child.

Where a child is seeking an order in their own right, leave must be granted to commence proceedings if the applicant is under the age of 16. The leave application is assigned to the High Court. A minor falls under the category of "Persons under a disability" pursuant to Rule 6.1(1) of the Family Proceeding Rules (NI) 1996 and they therefore must bring their application by way of next friend. There are very limited circumstances where a minor may proceed without a next friend (Rule 6.3 of the 1996 Rules). In *RH and others v IH, Stephens LJ* considered who is the appropriate person to take the role of next friend. In doing so he referred to Rule 6.2(2) of the 1996 Rules which states that "No person's name shall be used in any proceedings as next friend of a person under disability unless he is the Official Solicitor, or the documents mentioned in (6) have been filed". *Stephens LJ* felt that this rule, *"in effect creates a presumption that the next friend should be the official solicitor unless certain documents are filed in court."* The documents referred to are-

- (a) a written consent to act by the proposed next friend or guardian ad litem
- (b) a certificate by the solicitor acting for the person under disability –
 - (i) that he knows or believes that the person to whom the certificate relates is a person under disability stating the grounds of his knowledge or belief, and

- (ii) that the person named in the certificate as next friend or guardian ad litem has no interest in the cause or matter in question adverse to that of the person under disability and is a proper person to be next friend or guardian.

In the context of family relationships, and unlike in other areas of the law, there may be a conflict of interest in a child's parent acting as their next friend. It is not uncommon that a child brings an application against their parent and the other parent is also seeking an order for their own protection. In this type of case there is the risk of the other parent's interests being adverse to those of the child, in which case they should not act as next friend. In *Re Alwyn* [2009] NIFam 22, Stephens LJ commented that "*It is most unusual for one parent to act as the next friend of his or her child bringing proceedings against another parent. The official solicitor should ordinarily be the next friend*". An example of this is in *Re Arthur* [2009] NIFam 19 where the child was seeking an order against his father and his mother was acting as next friend. Although the mother was not also seeking an order and was not present at the time of the alleged incident, she had provided instructions to the solicitor in relation to the child's case, in doing so she created a conflict between herself and the father. Stephens LJ said "*If [the mother] is wrong in her instructions then her interests' conflict those of [the child]. Even if she is not wrong it is in her interest to establish during the trial process that she is correct and that may not be in the interests of [the child]*".

For a child to bring the proceedings in their own name they must have sufficient understanding to make the proposed application. It is imperative that there is evidence before the court in relation to this. In *Re Arthur*, Stephens LJ advised that "*there should be a statement from the solicitor or other evidence that a child under the age of 16 understands the nature of the proceedings*". Stephens LJ gives guidance that the solicitor should have met with the child and explained the nature of the proceedings. The child should also be aware that his parent could bring an application in the Domestic Proceedings Court and obtain an order for only his benefit or to include him as a relevant child. In *RH and others v IH*, Stephens LJ notes "*in exercising the discretion whether to grant leave factors such as these would have to be weighed carefully against for instance the factor that children should not just be seen as passive victims of family breakdown but as active participants and actors in the family justice process*". The solicitor should ensure that the instructions they receive are from the child and not the parent and their evidence should be recorded in a statement signed by the child.

Where an application is brought in the Domestic Proceedings Court, the parent brings an application in their own right. However, as a relevant child their son or daughter can benefit from the parent's order. Although the comments in *Re Alwyn* apply to a child's application in the High Court, there seems to be no reason for a different rationale in the Domestic Proceedings Court. Surely, if a parent is bringing the application to include the child there is still a risk that their interests are adverse to those of the child's.

Although an applicant in this circumstance will usually be a parent they do not have to be. As long as the child satisfies the definition of a relevant child (Article 3(2)) and the applicant is an associated person of the respondent, they are able to bring an application for the purpose of protecting the child.

In *Re Alwyn* it was argued that the father could not have commenced proceedings to seek an order to protect the child as there were no grounds for the father to make an application in relation to himself. However, Stephens LJ did not accept this argument. Under Article 20(2) (a) of the 1998 Order the court may make a non-molestation order if an application has been made by a person who is associated with the respondent. It was noted that there is no requirement that the applicant himself or herself is entitled to an order. Furthermore, the test for an order is "in all the circumstances including the need to secure the health, safety and

well-being (a) of the applicant... and (b) of any relevant child". Therefore, in considering such an application the court must consider the health, safety and well-being of the applicant as well as the relevant child. Stephens LJ commented that *"if an order is required in relation to ...a relevant child then the court has jurisdiction to and will make that order quite irrespective as to whether an order is made in respect of the applicant"*.

Alternatively, an application could have been brought in the Family Proceedings Court. Case law notes that a key issue that can appear in these types of non-molestation applications is contact or the implicit application for no contact. If an application is brought in the Family Proceedings Court for a no contact order by one parent against the other parent, then the court has the power to make a non-molestation order (*Re Arthur [2009] NIFam 19, para 6*). This allows and requires the court to consider the child's welfare as paramount.

When commencing proceedings for a non-molestation order for a child consideration should be given by practitioners to the appropriate court and route taken to seek such an order.

Role of Personal Litigants

Violence or abuse is often a factor in non-molestation cases. In the event that a respondent is not legally represented this could result in an alleged perpetrator of domestic violence cross-examining an alleged victim. The courts must strike a balance between the rights of the respondent, who we must remember is innocent until proven guilty and has the right to test the case against him, and the applicant who could be subject to further harassment or abuse all over again by their being cross-examined during the proceedings.

Domestic violence in today's society is an issue gaining greater prominence and understanding. However, as mentioned previously, Judges in family courts do not have the same statutory powers the criminal courts have to prevent cross-examination. Judges are able to use their general case management powers to control and oversee the questioning, but they are not able to prevent it or to appoint a legal representative for that purpose.

In England and Wales, a new Domestic Abuse Bill has been drafted but is not yet in force. To summarise the changes this bill will bring about in England and Wales:

- (a) In prescribed cases, cross-examination by a respondent of an applicant or witness will be prohibited.
- (b) In other cases, the court has the discretion to prohibit the cross-examination by the respondent of an applicant or witness. When considering whether to exercise this discretion the Judge should consider:
 - (i) If the evidence of the applicant or witness is likely to be diminished if cross-examined by the Respondent and if their evidence would likely to be improved if a direction was given; or
 - (ii) If the cross-examination would cause significant distress to the applicant or witness and the distress is likely to be more significant than if they were cross-examined by someone other than the respondent.

The court must also consider, among other things, if it would not be contrary to the interests of the justice to give the direction.

If the cross examination is prohibited, then the court can consider alternatives to cross-examination in person. In certain circumstances the court can appoint a qualified legal representative to act for the respondent for the purpose of cross examining the applicant and the fees or costs of that legal representative may be from the central funds. Currently such a lawyers' role is confined to conducting the cross-examination only. Potential issues may arise about the extent of the involvement of such a lawyer in the case and at hearing to ensure the cross-examination is appropriate, comprehensive and relevant. Cross-examination is not just about asking questions - it is set in the context of understanding the case the client has to meet, and the case the client wants to make.

It is not clear when or if this element of the new Bill will come into effect in Northern Ireland. However, some consideration must be given to the need to protect alleged victims of domestic abuse who seek the protection of the court. It could be argued that allowing a perpetrator to cross-examine their victim disregards the impact of domestic violence on victims and simply offers perpetrators another opportunity to bully and intimidate the victim. This has to be balanced against ensuring there is a fair hearing and giving weight to the rights of the respondent who is the alleged perpetrator. The burden of finding this balance currently falls on the Judiciary, who must carefully balance the competing principles of providing proper protection to a vulnerable witness on the one hand, with ensuring all relevant matters are tested and challenged appropriately in the interest of a fair hearing.

In the case of *PS v BP* [2018] EWHC 1987 (Fam), Mr Justice Hayden considered the case management exercised by the trial Judge. This case was a fact-finding hearing within family proceedings where there were allegations of rape and strangulation. The respondent was not legally represented. The trial Judge took on the burden of the cross-examination. The respondent identified questions and the Judge refined them in a way that he felt did justice to both parties. However, *"the Judge felt that the inevitable brutality of the questions, designed to reveal M's [the applicant] account of rape as dishonest, compromised his independent role and lowered him into a fray for which he simply had no appetite"* (paragraph 13). The trial Judge was found to have simplified the questions the respondent sought to ask in such a way as to "minimise their impact". The Court of Appeal commented that *"having decided to put F's [the respondent] case, [the Judge] was required to do so fully, properly and fairly"*. In short it was found that the trial Judge did not effectively cross-examine the applicant on behalf of the Respondent therefore compromising the fairness of the hearing.

So, in the absence of any legislative framework where does this leave the correct approach in cases of this nature? Where are the Judiciary to find guidance in striking this balance whilst ensuring that there is justice to both parties? The level of control and management required will depend not only on the case and the seriousness of the allegations but on the demeanour and presentation of the respondent and the applicant or witness who is to be cross-examined.

Conclusion

Non-molestation orders are already an integral part of the protections available to victims of domestic abuse. As societal awareness of domestic abuse increases and in the light of anticipated new legislation in this area, it is likely that such orders will have even more prominence in the front-line armoury of practitioners providing essential safeguarding to their clients.

RE T-S CHILDREN [2019] – HOW SHOULD THE COURTS IN NI APPROACH THE SO-CALLED ‘LESSER OF TWO EVILS’ DILEMMA IN PUBLIC LAW CHILDREN’S CASES IN LIGHT OF THE ENGLISH COURT OF APPEAL’S DECISION IN RE T-S?

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Introduction – The lesser of two evils?

The relatively recent English Court of Appeal case of – *Re T-S Children* [2019] EWCA Civ 742 is a useful reminder of how the courts will approach the situation where the Family Court and the Trust/Local Authority disagree on whether a particular care plan is in a child's best interests.

In the English case of *Re T (A Minor) (Care Order: Conditions)* [1994] 2 FLR 423, in which it was established that the court did not have power to make a care order, containing either a direction or a condition requiring the Local Authority to place a child in its care in a particular home as part of a care plan, the court enunciated the so-called “lesser of two evils” approach as follows:

“The judge is therefore faced with the dilemma... if he makes a care order, the local authority may implement a care plan which he or she may take the view is not in the child or children’s best interests. On the other hand, if he makes no order, he may be leaving the child in the care of an irresponsible, and indeed wholly inappropriate parent... He has to choose what he believes to be the lesser of two evils. That may be making a care order with the knowledge that the care plan is one which he does not approve, or it may be making no order with the consequence to which I have already adverted”.

This brief article will explore the guidance handed down by the English Court of Appeal in *Re T-S* on how to approach and deal with these conflicts against the backdrop some of the decisions of Northern Ireland courts in this area in order to assess how courts may approach such issues in future.

Re T-S: The problem

The case concerned a 5 year old child, J. While the final care order for J was not contentious, there was a “*difference of opinion between the judge and the local authority around the question of whether J should be placed for adoption or placed in long-term foster care*”.

The Local Authority social work team took the view that the child’s best interests were better served by a long-term foster care placement. The view of the child’s Guardian, backed by the assessment of an independent social worker, was that J’s best interests would be served if the care plan was one of being freed for adoption.

The Local Authority’s appeal was essentially brought on the basis that the appropriate care plan was a matter for it alone, and that the trial judge in refusing to make as final care order had been wrong when he stated:

¹ WCaldwell and Robinson

“The local authority has not satisfied me that the current amended care plan for long-term fostering best meets his welfare needs throughout his life. Standing back, looking at the whole of the evidence and considering the arguments that have been advanced on each side, I reach the conclusion, that his lifelong welfare interest is best met by his being placed for adoption if possible and...I therefore invite the local authority, to reconsider their position in respect of J and to make a placement application...If, the local authority do not take up that invitation, then the Guardian has already stated that she will consider the question of judicial review”.

It was clear from the appeal that the Local Authority accepted the judge had been critical of the social worker’s assessment, and that the Local Authority had not sought to challenge this. The issue being challenged was not therefore the judge’s welfare determination in respect of J, but rather the consequences of this for J’s care planning – with the Local Authority maintaining that the care plan remained solely a matter for it to determine.

Most legal practitioners dealing with public law family cases in Northern Ireland, particularly those acting for Guardians Ad Litem, will have encountered Trusts seeking to impress upon the court the argument that the particular care plan to be put in place for a child in its care is a matter solely for the Trust, and thus ultimately beyond the remit of the Guardian and indeed the Court.

Re T-S: The solution

The Court of Appeal allowed the Local Authority’s appeal and remitted the case for determination by a different judge. It did not accept the Local Authority’s position however that the trial judge should have made a final care order. In fact, the Court of Appeal determined that the ultimate ‘lesser of two-evils’ impasse had not yet in fact been reached in the circumstances of this case. Accordingly, the Local Authority should have been invited to properly consider the judge’s welfare determination – and to review and update its own assessment in light of the same.

One often overlooked but crucial feature of the case was that the Court of Appeal affirmed the principle set out by the English Court of Appeal in *Re W (Care Proceedings: Functions of Court and Local Authority)* [2013] EWCA Civ 1227. This provides that it is a matter for the court to determine the question of risk to the child’s welfare that the state, in the form of both social services and the court, will need to address following the usual fact-finding exercise. The Court in *Re T-S* quoted with approval the following in *Re W*:

“It is part of the case management process that a judge may require a local authority to give evidence about what services would be provided to support the strategy set out in its care plan, that is to support the placement options available to the court and meet the risk identified by the court. That may include evidence about more than one different possible resolution so the court might know the benefits and detriments of each option and what the local authority would or would not do. That may also include requiring the local authority to set out a care plan to meet a particular formulation or assessment of risk, even if the local authority does not agree with that risk”.

The court in *Re W* went on to say that:

“The court’s powers extend to making an order other than that asked for by a local authority. The process of deciding what order is necessary involves a value judgment about the proportionality of the state’s intervention to meet the risk against which the court

decides there is a need for protection. In that regard, one starts with the court's findings of fact and moves on to the value judgments that are the welfare evaluation. That evaluation is the court's not the local authority's, the guardian's or indeed any other party's. It is the function of the court to come to that value judgment. It is simply not open to a local authority within proceedings to decline to accept the court's evaluation of risk, no matter how much it may disagree with the same".

From the decision in *Re T-S*, the following salient points can be extracted:

- It is trite law that the court has responsibility for making orders, and that responsibility for considering, drafting and implementing care plans falls to local authorities;
- In order to make a care order the court has to be satisfied that the statutory threshold for the making of such an order has been met;
- The paramountcy principle requires that in order to make a care order the court has to be satisfied that such an order is in the child's best interests, and that the route to this conclusion is via rigorous scrutiny of the care plan by the court – with such scrutiny engaging not just the methodology behind the care plan, but also its merits;
- The rationale for such rigour is that once the court makes a care order responsibility for implementing the order passes to the Local Authority;
- Where the court takes the view that a care order is required in the child's best interests, but does not agree that the proposed care plan is in the child's best interests, the court is entitled to exercise a discretionary jurisdiction to adjourn the case (potentially on foot of an interim care order being made) and to invite a local authority to reconsider its care plan;
- There is a requirement of 'mutual respect' between the court and local authority. A local authority must use best endeavours to try to achieve agreement in relation to the care plan;
- If inviting the Local Authority to reconsider its position, the court should give appropriate directions for the next hearing to include directions for the filing of formal evidence from the Local Authority and attendance of witnesses;
- If there is still no resolution the court may find itself in the 'lesser of two evils situation';
- A Local Authority still maintaining its position in a 'lesser of two evils situation' may find that its position is vulnerable to an application for judicial review – particularly if the Local Authority's position is tantamount to a rejection of the evaluation of risk carried out by the court referred to in *Re W* above.

The position in Northern Ireland

The legislative position in Northern Ireland largely mirrors that in England and Wales though there have been a number of more recent statutory developments and interventions in the latter jurisdiction.

The case law on this point Northern Ireland, whilst largely congruent with that in England, does however suggest that there is scope for the courts in Northern Ireland to take their own particular view on these issues.

That the courts in Northern Ireland may be invited to go further than the above stated position in England and Wales is clear from the declaratory relief sought by the Guardian Ad Litem in the case of *Guardian Ad Litem's Application on behalf of JH (A Minor)* [2014] NIJB 165. This case concerned the placement of a child JH into a placement that was supported by the Trust, but vociferously opposed by the Guardian Ad Litem on behalf of the child.

The Guardian argued that Part V of the Children (Northern Ireland) Order 1995 on Care and Supervision is incompatible with a child's rights under Articles 6 and 8 of the ECHR, and Articles 3, 20 and 25 of the United Nations Convention on the Rights of the Child on the basis that it fails to provide for an express power enabling the Family Proceedings Court (or other family court) to make directions to the Trust authority regarding the placement of a child in the care of that Trust pursuant to an order of the Court.

In the circumstances of this particular case the judicial review brought by the Guardian was not heard in substance by Treacy J as the child's placement dispute had in fact been resolved by the time of the hearing. The court therefore refused to engage in what was by that point seen by the court as an historic and academic dispute. It nevertheless remains clear that ambitious arguments regarding the proper ambit of the family court's ability to direct a Trust regarding particular aspects of its care plans could yet be ventilated before the courts in Northern Ireland.

Something akin to the *Re T-S* approach was adopted by Gillen J in the case of *S (Care order: Care Plan: Contact)* [2006] NI Fam 4. The case concerned a child, S, where the Trust had made an application for a care order and was seeking to have the Court approve its care plan that S should not have contact with her father.

Gillen J summed up the court's role as:

"The making of a care order involves a two stage process. First, the court must consider whether or not the criteria for making a care order (generally referred to as "threshold criteria") have been satisfied... Thereafter, once the threshold criteria have been satisfied, the court must then consider whether a care order should be made in light of the care plan, the welfare checklist in Article 3(3) of the Order, the no-order principle enshrined in Article 3(5) of the 1995 Order, together with consideration of the range of possible orders including any order under Article 8 (residence, contact and other orders with respect to children)".

The court emphasised the importance of the court being satisfied as to the provisions for contact between parent and child before the making of any final care order. The judge had before him competing expert evidence as to whether reinstating contact between S and her father would be in her best interests.

Gillen J acknowledged the principle set down by the House of Lords in *In S (Minors) (Care Order: Implementation of Care Plan)*, *Re W (Minors) (Care Order: Adequacy of Care Plan)* [2002] UKHL 10 ("Re S and W"), in which the House of Lords made clear that interim care orders were not intended to be used as a means by which the court might continue to exercise a supervisory role over the local authority in cases in which it was in the best interests of a child that a care order should be made.

In making it clear that the case before him was distinguishable from that considered by the House of Lords, Gillen J stated that he was not prepared to approve the Trust care plan regarding contact on the basis that this was not in S's best interests. Gillen J stated that:

“I wish to make it absolutely clear it is not my intention to use an interim care order as a means by which the court may continue to exercise a supervisory role over this Trust but simply to enable a more choate and acceptable care plan to be drawn up in the context of contact. I shall make the interim care order for four weeks from today and I shall review the matter on that date. I trust that by that time the approach suggested by the guardian ad litem will have been adopted by this Trust and that one week before the hearing, a further report will have been filed by this Trust addressing the issue that have concerned me”.

The case of *Re SM (Interim care orders: Exercise of judge’s discretion) [2002] NIFAM 11* concerned an appeal by the child’s Guardian against a decision by the Family Care Centre judge to make an interim contact order rather than a final order as was being contended for by the Guardian. Counsel for the Guardian contended that *“the trial judge was seeking to exercise a supervisory jurisdiction over the implementation of the care plan and that in essence the judge was using the Interim Care Order as a means of exercising a now defunct supervisory role of the court”*.

Whilst accepting that *“there is no doubt whatsoever that the court does not have a function to oversee a care plan and that any attempt to do so by the court would be uncontestably inconsistent with an appropriate construction of the 1995 Order”*, and that *“the court must always maintain a proper balance between the need to satisfy itself about the appropriateness of the care plan and the avoidance of over zealous investigation into matters that are properly within the administrative discretion of the Trust”*, Gillen J expressly rejected the criticism directed at the trial judge by the Guardian and the Trust on the basis that:

“It is quite clear to me that the judge was indicating that contrary to the suggestion by the guardian ad litem and the Trust, this care plan was not clear in his view and that he required this further information before he could possibly consider making a Care Order... It is an extremely serious matter indeed to make a Care Order and it is not a decision to be made lightly. I consider this judge was properly and carefully recognising the very heavy burden that is cast on him and has appropriately decided that the situation is currently too uncertain to allow him to come to a final decision. I therefore consider that his decision to make a further Interim Care Order was a proper exercise of his discretion”.

Conclusion

The case law in Northern Ireland suggests that in many of the reported cases the common sense ‘mutual respect’ approach advocated by the Court of Appeal in *Re T-S* is already widely embedded practice in Northern Ireland, though that is not to say that issues regarding disagreement between Trust care planning and what the Court or Guardian considers to be in a child’s best interests do not continue to arise from time to time.

It would appear that best practice in such cases is for Trusts to avoid the temptation to rely on overly legalistic arguments that the Guardian (or family court) in raising such issues are straying beyond their accepted role into the administrative decision-making territory of the Trust – and instead focus on practical and sensible engagement with all those concerned to achieve an outcome that is best for the child or children at the centre of the case.

It is clear the approach suggested in *RE: T-S* offers a sensible and practical pathway to achieving such objectives in what are undoubtedly by their nature very difficult cases for all involved.

CHILD MAINTENANCE

By Michael Bready, Barrister at Law

Over the past few years some confusion has arisen around when it is appropriate to apply to the Court for child maintenance as opposed to applying to the Child Maintenance Service. This article is intended to provide some assistance on advising clients regarding this choice.

The Child Maintenance Service

On their very useful and informative website, the Child Maintenance Service (CMS) reminds users of the methods and merits of a “family-based child maintenance agreement”. This is essentially an agreement reached between the parties that can cover paying a sum of money regularly, a percentage of income, purchasing clothes/food instead of giving money or simply paying particular bills like the monthly mortgage repayment.

Of course the downside of such agreements is that they are not legally binding and therefore cannot be enforced.

If this is not an option, or the parties cannot reach any agreement, either party can use the online maintenance calculator to provide an indication of the amount of maintenance one party should pay to the other. The information required to use this online calculator is as follows:

- (i) the paying parent’s gross weekly income;
- (ii) the number of children the maintenance is to be paid for;
- (iii) the number of nights, on average, the paying parent has the child(children) for each year; and
- (iv) the number of other children living in the paying parent’s household.

The important issue to remember is that the amount of child maintenance, worked out by the online calculator, may be different from that which the CMS assesses that a paying parent should pay. In addition to this, some families’ circumstances are not covered by the online calculator, such as: when the paying parent’s income is greater than £3,000 per week; when the paying parent receives a benefit; and, when maintenance is shared between two, or more parents.

Once a formal assessment has been made by CMS, if the financial circumstances of either party change, then an application can be made to CMS to have the assessed amount varied.

A significant advantage, when considering a CMS assessment, is when enforcement comes an issue for an applicant. CMS can legally enforce an assessment and ultimately the assessed amount can be deducted directly from the paying party’s income at source and sent directly to the applicant. Another alternative is that the assessed maintenance can be deducted from the paying parent’s bank account. At present enforcement through- out the EU is possible, but practically proves quite difficult. Needless to say, post BREXIT enforcement will only get more difficult.

Assessments under the CMS scheme should continue to be paid by a parent until the child is either under 16, or under 18 and in full-time education

Court Applications

As explained above, it is not every family's circumstances that will permit the CMS to make an assessment of maintenance. One such example will be if the children are over 18, but still in full time education. Whilst strictly an application for any child under 20 can still be made using the CMS scheme, in practice such an application will be made to a Court pursuant to Article 15, Schedule 1, of the Children (NI) Order 1995 seeking an Order for financial relief in respect of children (a Schedule 1 application).

Before considering a Schedule 1 application, applicants must in the first instance consider "the overriding objective", set out in Order 1 Rule 1A of the Rules of the Court of Judicature (NI) 1980. Secondly, applicants must have regard to the Guide to Case management Private Law Guide.¹

Which Court?

Consideration should firstly be given to making the Schedule 1 application for maintenance to the High Court or County Court, as the High Court and County Court can make an Order for one or more of the following:²

- (a) periodical payments to the applicant for the benefit of the child;
- (b) periodical payments to the child directly³;
- (c) a lump sum to be paid to the applicant for the benefit of the child, or to the child directly; ;
- (d) settlement of property for the benefit of the child; or,
- (e) a transfer of property to the child, or for the benefit of the child.

The Schedule 1 application, if made to the Domestic Proceedings Court, could only result in Orders (a) and (c) above. In addition to this, if proceedings are issued in the Domestic Proceedings Court, the Court is restricted to making any lump sum Order to a maximum of £1,000.00.

When considering the appropriate venue between the High Court and the County Court, consideration should be given to any relevant assets in the case. If, for example, proceedings in respect of any potentially contentious assets could only be brought in the High Court, initiating all proceedings in the in the one Court jurisdiction might be prudent. Sometimes the Schedule 1 application may run in parallel to other related family proceedings, such as an Article 8 contact/residence application or divorce/ancillary relief proceedings. Best practice is to try to keep related proceedings in the same venue, or court tier.

Professional costs, court fees and how long proceedings will take to be listed for hearing should also be considered when considering the venue of any application. The cost of any

¹ Available to download from the Department of Justice website www.justice-ni.org

² Children (NI) Order 1995 NI 2 Sch 1 art.2(2)

³ Usually until the child reaches the age of 18, or completes full-time education

application should be weighed against the value of the case in respect of any Order that might be made.

Who is the “Applicant”?

A resident parent, or guardian, may make a Schedule 1 application up until the child’s 18th birthday. Thereafter, the child may make the application personally, if he/she has the necessary capacity to do so. If the necessary capacity is absent, then the Schedule 1 application should be made on their behalf by a suitable litigation “Next Friend”.

Matters for the Court to consider when assessing maintenance

The matters to be taken into account by any Court in Northern Ireland when making such Orders are as follows:⁴

- (a) the income, earning capacity, property and other financial resources of each person currently or in the foreseeable future;
- (b) the financial needs, obligations and responsibilities of each person currently or in the foreseeable future;
- (c) the financial needs of the child;
- (d) the income, earning capacity (if any), property and other financial resources of the child;
- (e) any physical or mental disability of the child;
- (f) the manner in which the child was being, or was expected to be, educated or trained.

In addition to the foregoing, Maguire J in *EC v CH*⁵ confirmed the following:

“In addition to providing a roof over the head of the child or children the court should determine what the principal carer reasonably requires to fund the family home and other routine issues such as the child’s holidays, travel expenses, entertainments and so on.”

Welfare of the child

Interestingly and potentially problematic, unlike other areas of the Children (NI) Order 1995⁶, there is no express reference to the welfare of the child. Despite the absence of this concept, its importance was explained by Hale J (as she then was) in *J-v-C (Child: Financial Provision)*;⁶

“The reason for the omission of the requirement to treat the child’s welfare as the first consideration is probably that these provisions apply in cases where the adult parties are, or were, married to one another and, therefore, the court will usually be faced with claims for some provision for the adults as well as for the children. In such cases it makes sense to provide that the children’s welfare should come before that of the adults in determining these claims. Nevertheless, in cases under the Children Act 1989 the welfare of the child

⁴ Supra cit., art. 5(1)

⁵ At para 20. Unreported MAG9713, delivered 25/09/15

⁶ Equally no such reference is made in the English legislative counterpart, the Children Act 1989

concerned, even if neither the paramount nor the first consideration, must be one of the relevant circumstances to be taken into account when assessing whether and how to order provision.”⁷

So although not expressly provided for in legislation, it still forms a significant matter for the Court to consider when assessing maintenance.

The issue of the welfare of the child was further considered by the High Court of England and Wales in the case of *P v T*⁸. The applicant mother in this case sought Orders for separate rate lumps sums in favour of the child, namely between £1.2m and £2.3m to provide a home in central London, £135,000 to furnish the property, £55,000 for a car, an education fund of £700,000 and also for a periodical payments order in favour of the child of approximately £170,000 per annum.

The case advanced on behalf of the mother was that the child was entitled to be brought up in comparable circumstances to the father’s standard of living and taking into account his resources. The crux of the father’s case in resisting this was that a suitable house could be bought, near the mother’s parents, for about £350,000.

The Court held that the following principles emerged:

- (i) the welfare of the child was an important, but not the paramount consideration. The standard of living enjoyed by the family was not a fact listed in Schedule 1 as one which should be taken into consideration;
- (ii) the court had to regard against unreasonable claims made on the child’s behalf, but with the disguised element of providing for the mother’s benefit rather than for the child; and
- (iii) the orders made should be fair just and reasonable.

Interestingly, the Court held that the sums claimed were a disguised maintenance claim for the mother and more modest periodical payments of £35,360 were awarded.

The Court of Appeal in England and Wales further added to the issue of welfare of the child in the case *Re P (Child: Financial Provision)*⁹. In this case an unmarried mother issued an application under Schedule 1. The father was an immensely successful international business man who described himself as “fabulously wealthy” and quite unbelievably conceded that he could pay a lump sum of £10 million if ordered to do so. The High Court awarded the mother, amongst other things, £450,000 for a house, £30,000 for furnishings and periodical payments of £35,360 per annum to be reduced by £9,333 on the child’s seventh birthday. There was also an award in respect of backdated maintenance of £7,500 (for a 26 month shortfall). The mother appealed.

Allowing the appeal, in what must be viewed as a welcome and socially progressive approach, the Court of Appeal held as follows:

- (a) The welfare of the child should be not just ‘one of the relevant circumstances’, but in most cases a constant influence on the discretionary outcome;

⁷ [1999] 1 FLR 152

⁸ [2002] All ER (D) 467

⁹ [2003] 2 FLR 865

- (b) The Court should recognise the responsibility, and often sacrifice, of the unmarried parent who was to be the primary carer of the child. The carer should have control of a budget that reflects her position and that of the father, both social and financial; and
- (c) The dominant feature in the case was the scale of the father's fortune and of his chosen way of life. The mother was accordingly awarded a housing fund of £1 million, £100,000 for internal decoration and periodical payments of £70,000 per annum¹⁰;
- (d) Further, the provision relating to backdating of maintenance in Schedule 1 applications should be broadly construed. Accordingly, the mother was awarded backdated maintenance of £40,000.

The Court of Appeal in England and Wales have, more recently, further extended the powers of any Order made pursuant to a Schedule 1 application in what are considered to be "big money claims". The full disclosure of the paying parent's assets and resources were held to not be essential or required in every case, as set out in *In Re A (a child) (Financial Provision: Wealthy Parent)*.¹¹

At first instance the very wealthy father gave no details of his financial situation, but indicated that he could afford any Order which the court might make. Without requiring any disclosure from the father as to his financial situation, the judge made an Order that the father:

- (i) purchase the freehold of a £3.5m house currently occupied by the mother and child as tenants, subject to a reversionary interest in the father's favour when the child completed tertiary education;
- (ii) make periodical payments of £204,000 per annum, as well as paying the child's school fees and a car allowance;
- (iii) pay costs attributable to the upkeep of the house and provide an immediate decoration and repair fund of £25,000; and
- (iv) pay a lump sum of about £770,000 to clear the mother's debts.

The mother's application to vary that order, made five months later, was refused. The mother appealed and submitted that the quantum of periodical payments ordered was too low because the judge had failed to ensure proper disclosure of the father's assets and resources. The mother argued that this failure in disclosure had prevented the judge from determining what was a *fair proportion* of the father's wealth. The Court held that despite the statutory list of what must be considered by a court including the income, earning capacity, property and other financial resources, as follows:

"...a Schedule 1 application would be unlikely to call for a detailed examination of financial resources and it was open to a judge..... to find that a broad indication of wealth was sufficient."

¹⁰ [2015] Fam 277, para 20

¹¹ [2015] Fam 277

Further to this, the Court went on to state:

“The extent of the non-residential parent’s wealth may still inform reasonableness of budgetary claims as well as ability to pay; that is, for example, the child of a wealthy man may well expect to be dressed in designer rather than high street store clothes. However, that is not to say that the court may dispense with any budget and sanction an award supportive of a lavish lifestyle devoid of context

The court is responsible for ensuring appropriate financial support for the child and must confine the aspect of the carer’s allowance within the award to its legitimate purpose.”¹²

And then an important consideration in all cases, millionaires or not, was stressed by the Court as follows:

“The nature of the child’s home environment provides the obvious base line from which to consider commensurate levels of maintenance and is as good as any other.”¹³

The “millionaires defence” against oppressive discovery Orders being made, is a commendable judicial attempt to try to avoid costly disputes around the issue of disclosure (or the lack of disclosure). However, to rely on such a defence, the assets would now, in my opinion, have to be very substantial. So, whilst I would be very surprised if a Court in Northern Ireland permitted a party to conceal their income, earning capacity, property and other financial resources, at least the standard of living that a child or children enjoyed in their home environment is the “baseline” for any maintenance assessment by a Court. In reality, if a party adopted a position of refusing to provide reasonable discovery, whilst a court can compel the defaulting party to provide the requested discovery and a punitive Contempt Order could be made¹⁴ with costs awarded to the party refusing to comply, ultimately adverse inferences can be drawn in respect of any refusal of any discovery request.

Lump sum and periodical payment Orders

As discussed above, any Court can make either a lump sum or periodical payment Order, or both. The issue of how long they can be made for has been clarified by the High Court in Northern Ireland. Stephens J (as he then was) in the case *Caitrin, Dona and Elliot (Pseudonyms) (No 6) (Financial Provision for the children)*¹⁵ confirmed that the matters that a court must take into account when making such Orders are set out within Schedule 1(5) (1). However, the Court specifically addressing the length of such Orders. Periodical payment Orders should not:

“extend beyond the child’s seventeenth birthday unless the court thinks it right in the circumstances of the case to specify a later date and shall not in any event extend beyond the child’s eighteenth birthday.”¹⁶

The Court further confirmed that third level education (in this case it was university) shall mean that the periodical payment Order can continue after the 18th birthday. But, in addition to this, a lump sum Order can take third level education into account as well.

¹² Supra cit. at para 21

¹³ Supra cit. at para 22

¹⁴ On foot of the appropriate applications for such Orders

¹⁵ [2010] NIFam 22

¹⁶ Supra cit. at para 6

“There is no provision within Schedule 1 preventing a court from having regard in calculating a lump sum payment to events after a child’s eighteenth birthday. I consider that the court is obliged to have regard to such events by virtue of paragraph 5(1)(c) and (f) of Schedule 1. I am required to have regard to the financial needs of the child and the manner in which the child was being, or was expected to be, educated or trained. In this case all of the children were expected to be educated at university.”¹⁷

Whilst this decision clarifies the permissible length of such Orders, it arguably also positively adds to the expansion of the concept of how Courts may consider the welfare of the child, specifically when considering educational needs.

Maintenance agreements between the parties

There does, of course, exist provision that the parties can agree what maintenance is to be paid, when it is to be paid and how it is to be paid. This is not legally binding upon the parties, even if this is achieved between the parties as a result of negotiation, or mediation, and not made an Order of Court. However, despite this, should either party’s circumstances change, an application may be made to the Court to vary this agreement.¹⁸ The change of circumstances relied upon can include a change that was, or could be, foreseen.¹⁹

Commonly known as “upward” or “downward” variation applications, it is not necessary that a Court make the original assessment before such an application can be made. Naturally, parties should try to negotiate, or mediate, the new figure/s before rushing to make an application to a Court.

Court approved agreements

If the parties issue proceedings and then come to an agreement between themselves regarding maintenance, then this can be made an Order of the Court. The advantage of this being that it is, and will continue to be, enforceable in Northern Ireland.

However, in Scotland and England and Wales, an agreement such as is only enforceable for a period of 12 months. If such an agreed order for child maintenance was made after 3rd March 2003, a party can opt out after 12 months. Thereafter, should a change in the terms not be agreed between the parties, either may apply to CMS to assess the maintenance rather than returning to the Court to vary the terms.²⁰ The effect of this provision is that the CMS jurisdiction takes over from the court Order and the court ordered maintenance lapses. You will pay the CMS assessed amount from that point on, whether it is higher or lower than the court ordered maintenance. This is a provision, that if extended to Northern Ireland, would make a significant change to the landscape of Schedule 1 applications

Conclusion

Courts in Northern Ireland now insist upon a CMS application to be made in the first instance, certainly before any application for a Schedule 1 application is determined. Thereafter, a party may apply for additional relief, if appropriate, pursuant to legislation and authorities. Given the straightforward method of using the CMS online calculator to workout the paying

¹⁷ Supra cit. at para 7

¹⁸ Children (NI) Order 1995 NI 2 Sch 1, art.12(1)

¹⁹ Supra cit., art 12(3)

²⁰ Section 2 of the Child Support, Pensions and Social Security Act 2000, section 4 of the Child Support Act 1991 permitting such jurisdiction

parent's liabilities, it seems that there are fewer cases of schedule 1 applications for courts to consider. As is many areas of family law, each case normally turns on its own facts and financial circumstances. The authorities provide useful guidance for courts on the general principles to be applied, but each Judge will have their own accounting exercise to consider.

In any event, if a Schedule 1 application is being considered, there should be no delay with any CMS assessment, even if the expectation of such an assessment is a "nil assessment". Failure to do so, will lead to an inevitable delay and perhaps an exposure in costs.

THE VALUE OF TIMELY FACT FINDING HEARINGS IN PRIVATE LAW FAMILY PROCEEDINGS

By Maeve Mullan, Barrister at Law

Parties to Contact and Residence disputes often come before the Court resolute in their unfavourable views of their former partner and determined to have their beliefs vindicated and verified by the Court. The Court will then have to decide in what circumstances, if at all, it is appropriate to have a hearing on the parties various allegations. The Guide to Case Management in Private Law proceedings, clearly sets out that at First Directions stage consideration should be given to 'the identification of issues suitable for early decision.'¹

When there are allegations of domestic violence, a *Re L*² hearing is normally directed at the First Directions Hearing or very shortly thereafter. Sometimes *Re L* hearings are resolved, as the parties can reach an agreed finding of facts or an agreed way forward for contact without any findings. If this does not happen, the Court will determine and make findings of fact in respect of the *Re L* hearing.³ These findings will typically take the form of a list of findings, which form part of a Court Order and which are recorded for future usage if necessary.

In cases where a *Re L* hearing is not sought from the outset, there can still by a myriad of other issues and allegations raised, there may be rows and allegations arising from contact handovers, failed contact, or allegations of emotional or physical neglect against the other parent. Sometimes many months after court proceedings have started, allegations can be made which are historic in nature and which have never been raised before. These types of allegations can be more difficult for a Court to determine particularly when there is or has been ongoing contact.

The Courts encourage contact and are often hesitant to engage in hearings which would appear counter-productive to contact. The Courts quite often take the attitude that parents need to take a common sense approach, they implore legal advisors to advise clients appropriately and encourage clients into some form of ADR⁴ if they have not already tried it. Often a Court Children's Officer has been engaged to assist with a way forward for contact. More often than not, these approaches work. Family Courts generally encourage parties to work together and understand the value of each parent to a child. What happens if they do not and they continue to make allegations against each other? Generally, each party lodges a statement, any supporting evidence and the matter is heard by the Court. By this point however it is rarely a Fact Finding hearing that is engaged in, instead based on the evidence presented to it, the court determines the merits of the Residence and/or Contact Application before it and any other Article 8 Order⁵ which should be made without any findings of fact. There is not typically a list of facts determined by the Court for future usage, or certainly not in the same way as is done in *Re L* hearings.

Invariably there is at least one dissatisfied party. The dissatisfied party often returns repeatedly to the Courts either with an appeal or a fresh application. They often cite further issues with contact, further examples of how the other parent is alienating them from their

¹ Guide to Case Management in Private Law Proceedings at 5.3.12

² *Re L* [2000] 2 FLR 334

³ The Children Order Advisory Panel, Best Practice Guidance, 2nd Edition 2010, at 5.14 and Appendix 18

⁴ Alternative Dispute Resolution, which could include mediation, conciliation or arbitration

⁵ Children (NI) Order 1995 NI 2

child or children and how contact has broken down. They claim the other parent is implacably hostile. They remain unsatisfied with the Court's Orders in the previous proceedings. Quite often they have moved to a new Solicitor for advices or alternatively have decided to self-represent. Sometimes, the proceedings are now before a new Judge, there could be a new CCO or indeed a change of location has occurred for the children thereby introducing new professionals into the children's lives. All of these issues can further muddy the waters. When there has been no clear determination of the facts by the Court in the earlier case, this can leave the decision of the earlier court open to being unpicked by parties who continue to rehash old issues.

Some of these appeals or fresh applications for Contact/Residence will be entirely meritorious, others may not. There has been recent judicial guidance on appeals *de novo*⁶ which should be of assistance in some of these cases.

However, what of the persistent litigant? Those that claim that there are continual contact problems but who are in fact only aggrieved by the prior court decision and lack of vindication for their point of view? There are very many cases of implacable hostility in the Courts but there are also cases by those who just do not accept the determination of the Courts. Sometimes, these two factors can become entwined to the extent that the court ponders the age old question, what came first, the chicken or the egg? Is a parent implacably hostile due to the persistent allegations of the other parent, or do the allegations arise due to the implacable hostility?

When there has been no clear determination of the facts, this does leave an open window for those persistent litigants to rehearse issues which should have been put to bed.

Res Judicata?

The fundamental doctrine of Res Judicata (that there must be an end to litigation) should be of great significance in these types of cases. However, cases involving children are ever evolving. Children have changing needs and become increasingly aware of their circumstances as time moves on and as a result it is widely acknowledged that doctrine is limited in children's cases.⁷

What then is to be done in then? Does the court now engage in an "out of time" fact finding to put the historic issues to rest when clearly those issues are not the pressing issue of the day relating to the child? Does the Court make further attempts to resolve the contact/residence dispute by way of assistance of mediation, CCO or other expert? Will the dissatisfied parent ever be satiated by any of these options in any case?

If a fact finding hearing had taken place, via the format of a *Re L* hearing or otherwise, all would not be lost in respect of the Doctrine of Res Judicata. The case of *K v P (Children Act Proceedings: Estoppel)* [1995] 2 FCR at 457 very helpfully sets out that the doctrine is applicable where⁸:

- a) the judgement in the earlier proceedings:
 - i. was given by a court of competent jurisdiction
 - ii. the decision was final and conclusive
 - iii. the decision was on the merits of the case

⁶ O v C [2017] NICty 3

⁷ See Children Law and Practice: Hershman and McFarlane at 3106

⁸ See Children Law and Practice: Hershman and McFarlane at 3107-3109

- b) the parties to the proceedings are the same;
- c) the issue in the later proceedings in which the doctrine (*res judicata*) is raised as a bar is the same issue that was decided in the earlier proceeding;
- d) fresh evidence may be admissible if it has become available to show that the earlier judgement of the court was wrong.

The case of *Re B (Children Act Proceedings) (Issue Estoppel) [1997] 1 FCR* helpfully sets out the following⁹:

- a) that a court is not bound to allow evidence to be called on each and every potentially relevant issue, but has a discretion as to the extent to which a party in one case can rely on findings in previous proceedings;
- b) that where findings of fact are challenged in subsequent proceedings, the court should be informed not only of the findings but also of the evidence upon which the findings were based
- c) The court's discretion must be applied so as to work justice and not injustice. Some of the factors to be borne in mind are:
 - a. underlying considerations of public policy, such as finality in litigation;
 - b. the prejudicial effect of delay on the welfare of the child balanced against the likely effect of reliance upon determinations of fact which might turn out to have been erroneous;
 - c. what form the previous hearing had taken;
 - d. the importance of previous findings in the context of current proceedings;
 - e. above all, whether a rehearing of the issue would result in any substantially different finding.

Additionally it is important and assisting to note that the case of *F and L v A Local Authority and A (2009) EWHC 140 (Fam)* sets out that where the court engages in a re-evaluation of a past finding of fact, the burden is on the party that seeks to overturn the finding to establish that the original finding is wrong.¹⁰

Should the court's therefore make fact findings even when it is not specifically a Re L hearing?

The value of a determinative Fact Finding hearing should not be understated. Timely Fact Finding hearings are of the utmost importance in Children Order proceedings. Evidence should be heard and tested by the Courts in close proximity to the alleged timing of events. Thereafter clear determinative fact findings can be made by the Court and should bring finality to the allegations made by one or both parties. These clear determinations should then allow future Courts, appeal or otherwise, to utilise the doctrine of *Res Judicata* in Children Order

⁹ Ibid

¹⁰ Ibid

proceedings and focus on the issues of the day. These clear determinations should allow the court to effectively dispose of those persistent litigants when no new issues are arising.

That is not to say that the Courts should be tasked with determining every allegation made. The decision in *T v T (2010) EWCA 1366* assists in this regard. In that matter, on appeal, both parties complained that “the Recorder erred in not making findings that were relevant and necessary for the disposal of the issues between the parties.”. The substance was that each party had set out events, which they believed the court should have adjudicated upon, and thereafter used this information to assist in determining the final order made by the court and by not doing so the court had failed in its duty. The Appeals courts response to this was:

“It is not necessary for a judge to make findings on every issue that is presented to her for determination or makes itself apparent during the hearing. What is required is that she should determine any factual issues that have implications for the decisions that she has to take in relation to the child.”

It is apparent therefore that appropriate advices should be given to clients on what the Courts would regard as relevant information for a fact finding hearing.

Persistent litigation on the same issues potentially could be avoided by the effective and timely use of determinative fact finding hearings rather than a hearing which simply adjudicates on Contact and Residence. Punctual and determinative fact finding hearings can ultimately result in less litigation. They allow issues to be addressed, boils to be lanced, and ultimately give any future Court, Legal Representative or professional a baseline to work from when a new application is made by a serial unsatisfied litigator. This would then in turn allow the issues of the present day to be addressed and the best interests of the child to return to the fore.

CASE NOTES

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND QUEEN'S BENCH DIVISION (JUDICIAL REVIEW) IN THE MATTER OF AN APPLICATION BY SK2 FOR JUDICIAL REVIEW, delivered per O'Hara J on the 21 December 2018

FACTS

The case concerned a 16 year old boy, identified as Sean, who is a "looked after child" (Article 25 of the Children (Northern Ireland) Order 1995, "The Order"). As a looked after child, the relevant Trust has a duty to provide Sean with suitable accommodation under Article 27 of the Order. Due to his own needs and the care given to him by his parents up until he was taken into care in 2005, Sean had multiple issues including developmental delay, attachment to adults and ADHD. A foster placement broke down and due to Sean's behaviour in and out of their home, the Trust were unable to find a suitable foster care placement and he was placed in residential homes. In order to assist the Trust in trying to place Sean, they obtained two psychologist reports which confirmed that Sean, inter alia, was unable to cope with day to day living without others' assistance. He was a child at risk due to his inability to understand social cues and his absconding. In short, he required a bespoke care package with trained adults to supervise and care for him. Dr Leddy reported in 2016 that, "...Sean's model of how relationships work is defective because he did not benefit from positive, secure, safe early relationships...he finds it difficult to understand himself and other people, is easily irritated and he is difficult to reach emotionally.."

In 2017 the Trust applied for, and obtained, an interim care order, granting them parental responsibility for Sean and later, a declaratory order, providing for Sean's care and protection. These orders are rare as they curtail a child's liberty in circumstances where the child has not been convicted of a criminal offence. This order provided that the staff in Home X could restrain Sean from absconding and could lock him in the home.

Sean was the only child residing in Home X and the intention was that he would move to a specially adapted annex in Home Y when it was ready. In the event, Sean moved to Home Y earlier than originally planned in July 2017. In August 2017, however, Sean was arrested due to a series of assaults and other offences. He had caused serious injuries to many of the staff caring for him there, including a broken collar bone and a wrist fracture. He also verbally abused staff members. He was, later in the month, granted bail, subject to a suitable address being found for him. Home Y would not accept him due to his previous behaviour and the risk he posed to their staff members.

This meant that the Trust were not in a position to provide Sean with a suitable address for bail purposes.

An application for judicial review was made in early September 2017 on the basis that the Trust had not complied with their duty under Article 27 of the Order. Sean's representatives sought a declaration that the Trust was in breach of its duty under Article 27 to provide accommodation for Sean.

HELD

The application for judicial review was refused by the Court, the judge finding that there had been no breach of the Trust's duty under Article 27 of the Order in these circumstances.

REASONING

Sean's representatives argued that, due to the Trust not finding Sean suitable accommodation, he had remained in custody for seven weeks by the time of hearing, the duty contained in Article 27 of the Order is an absolute one requiring the Trust immediately to do what was required and that it was, "impermissible to read into the duty any concept of allowing, "reasonable time" to find accommodation because that is contrary to the duty being absolute and immediate." It was accepted by Sean's representatives, that this was a particularly challenging case.

The Trust's representative conceded that the Trust did have a duty under Article 27 of the Order to provide accommodation which was "suitable for that particular child in need." That accommodation must provide protection, safety and more to the child. They also accepted that the duty was absolute but did not necessarily require immediate action to accommodate. In the case of *Re MP (2014) NIQB 52* the Children's Commissioner had acknowledged the concept of a, "reasonable period," being allowed to the Trust. Sean's representatives conceded that the duty of the Trust was to provide accommodation which was, "suitable for that particular child in need."

The court considered that, "It is necessary to be comparatively strict when interpreting and applying the stark terms of Article 27 because its purpose is to protect those children who are most vulnerable, challenging and damaged."

The court considered the case law, including *Re MP (2014) NIQB 52* wherein the court accepted that there was a duty for the Trust to provide suitable accommodation within a reasonable period of time. The case of *JR47 (2013) NIQB 7* concerned what time conditions were to be interpreted into the Trust's duty to provide accommodation and other services to vulnerable adults. Here it was held that every case was, "unavoidably fact sensitive." In some cases the need would have to be provided for with immediate effect and in other cases, "swift but not immediate provision would be appropriate."

Here, the court considered that it would be unreasonable to demand that **suitable alternative** accommodation is immediately available. Home Y had been modified to care for Sean but the events leading up to Sean's arrest meant it was no longer available to him and that the Trust could not have reasonably foreseen or planned for this.

In all the circumstances, the Trust had not breached its duty under Article 27 of the Order and the application for judicial review was refused.

**IN THE HIGH COURT OF NORTHERN IRELAND
FAMILY DIVISION
IN THE MATTER OF THE CHILDREN (NI) ORDER 1995
AND IN THE MATTER OF THE ADOPTION ORDER (NI) ORDER 1987
RE: C (A CHILD), delivered per O'Hara J on the 19th July 2019**

FACTS/BACKGROUND

The Trust were seeking a care order and an order freeing C, a female child, aged just over two years, for adoption. The mother was objecting to both orders being made and was seeking that C be returned to her as soon as possible.

C was the mother's fifth child. None of her children were living with her, the two eldest lived with their father in England, the third and fourth were in long term foster care in Northern Ireland. The mother has regular contact with these children which the court described as

“problematic.” During contact visits she tells the children that she is fighting to get them back to her and they become unsettled.

The mother had various historical issues including problems with alcohol, ongoing dishonesty with professionals and attempts to explain dishonestly what independent witnesses said about some bizarre behaviour and a refusal to accept that her children should not be living with her.

C was born in Spring 2017 and the mother at that stage was in a relationship with a Mr K who she said was C’s father. She indicated to the Trust that this was a preferable relationship to those she had been involved in the past. The mother was a member of the travelling community and had indicated that other members of that community did not want her to make positive changes in her life. Mr K was not a member of the travelling community and she indicated that this relationship would assist her in making positive changes.

In September 2017, however, C was removed from the mother in circumstances where the mother was drunk, suffering from injuries caused by a confrontation with other member of the travelling community and was not in a fit state to care for C. It transpired, after DNA testing, that Mr K was not C’s father.

At the start of the present hearing, the mother accepted and signed threshold criteria which included an acceptance by her of the events which had led to C being taken into emergency care in September 2017, that Social Services had been involved with her in relation to all her children due to her alcohol and drug problems and involvement in violent relationship and dishonesty with professionals, she had lied to the Trust and others about Mr K being C’s father, she lacked the ability to care for her children’s emotional needs and did not accept that the children had needed to be protected from her, leaving her older children unsettled and undermining their care arrangements.

While accepting the threshold criteria, the mother did not accept the Trust’s applications for care and freeing orders with respect to C. Ideally she wanted C to be returned to her but in the alternative sought that C be placed with her current foster carers under a long term fostering arrangement. C was very settled in that home but the Trust were not considering the foster parents as long term carers or prospective adopters of C due to their age – C was 2 years old and the foster father and mother were 60 and nearly 60 years of age respectively. The foster parents wanted C to remain with them.

HELD

The court made a care order based on the care plan that C be freed for adoption and an order under Article 18 of the Adoption (Northern Ireland) Order 1987.

REASONING

The fact that threshold criteria were made out and accepted and signed by the mother did not mean that a care order or an order freeing C for adoption were necessarily in C’s best interests.

The court had regard to the background in this case, however, the mother’s issues with alcohol and drugs were long term and chronic. While she had made some attempts in that past to deal with these, she had not been successful. Her inability to protect her children from harm and to work with professionals to change her life around put C at risk. The court did not consider it a realistic proposal for C to be returned to her care.

The court went on to look at the respective merits of long term fostering and freeing. Long term fostering would be a less “draconian” option – it was the mother’s plan B and the result desired by C’s foster carers. The court, however, felt that there were two main problems with this proposed course of action. Firstly, the age of the foster parents. While legally there is no age limit on adoption the Trust had written to the carers outlining their view that there would be no more than 45 years between a child and one of their adoptive parents, save in circumstances, for example, where this might allow siblings to remain together or to provide a permanent home for a child who suffered from a disability. In this instance the carers had raised as an issue about some seizures that C had suffered in 2019 which might denote epilepsy or perhaps autism.

The court considered that the Trust’s stance in relation to the age of the carers was not unreasonable. There was a gap of more than 55 years between them and C. Furthermore, the Trust had taken medical advice about C’s health and it was agreed by all concerned that C was somewhat developmentally advanced for her age. It was thus not unlikely that C would be placed for adoption.

Secondly, the background to this case was that the mother had a history of undermining her children’s long term placements by telling the children she was fighting for them, to the extent that her six year old child had told his foster parents that he would allege they punched him every day.

The court considered that C’s best interests would be served in being freed for adoption. Due to the mother’s background and attitude, the court considered that she was unreasonably withholding her consent to adoption.

In all the circumstances, the court made a full care order, endorsing the plan to free C for adoption and made an order freeing C for adoption.

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
FAMILY DIVISION**

BETWEEN MMQ, Petitioner/Respondent (“the wife”) and AJQ, Respondent/Appellant (“the husband”), per McBride J, delivered 23rd October 2019.

BACKGROUND

The case concerned an appeal by the husband against an order of the Master in ancillary relief proceedings.

That order had provided that:

The husband transfer the former matrimonial home in Cookstown to the wife

The husband transfer to the wife the property at 58 Prout Grove, London

The property in Moneymore, jointly owned by the parties was to be sold and the wife would retain the net proceeds of sale. If the sale proceeds did not cover the mortgage and other liabilities then the wife was to discharge any liabilities using the parties’ joint bank accounts and then retain any balance from those accounts.

The wife was to receive the proceeds of two Friends Life policies.

The parties would retain any other assets, including pensions, held in their sole names.

The Mareva injunction was to be varied to allow the Master’s Order to be implemented.

The husband was to pay one third of the wife’s legal costs in bringing her application for ancillary relief.

In terms of the earlier proceedings before the Master, the husband had failed to co-operate with these and had been in breach of various orders including to provide an affidavit of means, attend court on foot of an order for examination of his means and assets and did not attend the final hearing of the case in April 2016.

The husband appealed the Master's Order.

FACTS

This was a marriage of 15 years with a 6 year period of cohabitation prior to the marriage. There were two children of the family aged 17 and 14 years who resided with the wife and who had regular contact with the husband. The parties separated in 2012 and the wife obtained a Mareva injunction in 2012, a decree nisi of divorce in October 2014 and issued ancillary relief proceedings in January 2015.

The court on appeal found that there were the following assets of the marriage:

Joint:

58 Prout Grove, London with an equity of £636,829
The matrimonial home in Cookstown with an equity of £207,500
The property in Moneymore with a negative equity of £54,000
Bank accounts with total balance of £3909.51
Friends Life Policy valued at £1714
Contents of the matrimonial home

Wife's assets:

Bank accounts with a total of £34,000
Pension with a CETV of £353,000
Dissipated assets of £104,000

Wife's income:

£23,340 per annum

Husband's assets:

20% interest in properties in Chapelside, London totalling, £530,000
60 Prout Grove, London with an equity of £412,500
Bank accounts with a total of £34,000
Pension with a CETV of £87,000
Dissipated assets of £153,000

Husband's income:

Total income or earning capacity of £71,400 per annum.

HELD

The judge on appeal, retained the order for costs made by the Master in the ancillary relief proceedings at first instance. Otherwise, she made no order as to costs.

The wife's entitlement was as follows:

A maintenance lump sum buyout of £120,000
Half the equity in 58 Prout Grove, London - £318,000
60/40 split of the equity in the matrimonial home in Cookstown - £124,500
Half the proceeds of the Friends Life Policy - £3000
Half of her own bank accounts - £17,000

Half of 60, Prout Grove, London - £206,000
Half of husband's bank accounts - £17,000
The sum of £24,000 to equalise dissipated assets
Less half the negative equity in the Moneymore property - £27,250
Less £65,000 due to the husband for pension off setting

REASONING

The court on appeal dealt with the case as a rehearing, *National & Provincial Building Society v Williamson & Another (1995) NI 366*, where Girvan J stated, "The judge will of course, give the weight it deserves to the previous decision of the master, but he is in no way bound by it... the judge is not fettered by the previous exercise by the master of his discretion."

Here the court admitted fresh evidence by way of affidavit, oral evidence and valuations and in those circumstances did not feel it necessary to deal with the complaints made by the husband about the earlier proceedings in front of the Master.

In establishing what the assets were (see above), the court had the benefit of various affidavits from the parties, an affidavit from the husband's brother, oral evidence from the parties although no proper evidence from experts regarding the valuations of the various properties. Each party had complained that the other had not provided full and proper disclosure of their assets however the judge considered that, while discovery was not perfect, there was sufficient information for her to make a decision about the parties' respective entitlements on foot of the wife's ancillary relief application.

The judge drew reference to the credibility of the husband and the wife, finding the husband to be, *inter alia*, evasive, dishonest and unhelpful whereas she considered the wife to be a credible witness. In these circumstances, "the court gives little weight to his evidence generally."

In deciding on the wife's entitlement on foot of her ancillary relief application the court drew reference to the factors contained in Article 27 of the Matrimonial Causes (Northern Ireland) Order 1978 and case law as helpfully summarised by Duckworth in "Matrimonial Property and Finance."

These principles were a summary of the seminal cases in ancillary relief proceedings: *White v White (2000) 1 AC 596* and *Millar v Millar (2006) 2AC 618* and set out as follows:

1. The goal of financial provision is fairness
2. Fairness does not mean equality. It means an absence of discrimination
3. The discretionary nature of the legislation means that the outcome is often unequal division of assets but before making a decision the judge should check his tentative views against the yardstick of equality.
4. Equality is a starting point in respect of matrimonial property
5. The existence of non-matrimonial property is a good reason to depart from equality although the longer the marriage the less this will be a decisive factor. Where the dominant or magnetic factor is inherited property the award will generally be based on "needs" rather than sharing – See *K v L (2011) 2FLR 980*
6. The boundary between matrimonial and non-matrimonial property is not rigidly defined but non-matrimonial property can include pre-marital property, extra-marital property, post marital property and unilateral property
7. The rationales for the exercise of the court's discretion to adjust property rights is: - need, compensation and sharing. These may overlap

8. The court should wherever possible bring about a clean break between the parties. This is especially so when the financially stronger spouse is able to make available sufficient capital to satisfy the housing needs and make the other spouse self-sufficient in other respects.

With a period of 6 years of cohabitation and a marriage of 15 years, this was treated by the court as a long marriage.

The present case was one where it was appropriate to effect a clean break between the parties.

There was however a disparity in income between the parties, the wife was receiving treatment for cancer and she had primary care of the children of the family. Following on the separation she had not received maintenance for she and the children and the court felt a lump sum should be awarded to reflect this. She had, during the marriage, given up high paid employment to care for the children. In these circumstances an entitlement to maintenance was established. In working out the wife's entitlement to maintenance, the court referred to the case of *V v V (2005) 2 FLR 697* where Coleridge J adopted a percentage figure of 40%, he said however, "There can be no hard and fast rules...section 25 are the only real criteria." In this case the court felt a percentage of 44% to be a suitable one, this included a figure for maintenance due in relation to the children of the family. The parties had been separated since 2012 and the court used a multiplier of six to give a lump sum payment to the wife of £120,000.

The court went on to consider in the present case the issue of matrimonial and non-matrimonial property. This was required as the husband was arguing that some of the assets either in the joint names of the parties or in his sole name were non-matrimonial assets and should be either taken out of the "pot" for division or in any event treated differently. The court made findings of facts regarding these assets and examined the case law regarding matrimonial and non-matrimonial property. This included the case of *Scatliffe v Scatliffe (2017) AC 93*, where Lord Wilson stated:

- " (i) Section 26(1)(a) of the 1995 Act obliges the court to have regard to the "property and other financial resources which each of the parties...has or is likely to have in the foreseeable future".
- (ii) Thus, when a court finds that an asset is not one in which either party has any interest... no account should be taken of it
-
- (iv) In the *White* case...Lord Nicholls proceeded...to refer to "matrimonial property" and to distinguish it from "property owned by one spouse before the marriage, and inherited property, whenever acquired". In the *Miller* case...he described the latter as "non-matrimonial property", and he explained his earlier reference to "matrimonial property" as meaning "property acquired during the marriage otherwise than by inheritance or gift".....
- (vi) it is contrary to section 26(1)(a) of the 1995 Act for a court to fail to have regard to "non-matrimonial property". This raises the question: in what way should regard be had to it?...and
- (viii) "not only matrimonial property but also non-matrimonial property was subject to the sharing principle...following a short marriage, a sharing of non-matrimonial property might well not be fair... the significance of non-matrimonial character would diminish over time....irrespective of whether it fell to be *shared*, a spouse- non-matrimonial property might certainly be transferred in order to meet the other's *needs*....
- (x) So in an ordinary case the proper approach is to apply the sharing principle to the matrimonial property and then to ask whether, in the light of all the matters specified in section 26(1)...the result of so doing represents an appropriate overall disposal.

In the present case the property at 58 Prout Grove, London was used as the matrimonial home and later the rental income used to pay joint bills and was properly to be regarded as matrimonial property. On the other hand, properties in which the husband held a 20% interest in were considered to be non-matrimonial property by the court because of the nature of the husband's legal and beneficial interest in them and that fact that he had acquired this interest years before the parties married when he was still a minor.

In all the circumstances the court made the order as stated above.

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
FAMILY DIVISION**

BETWEEN S, Petitioner and S, Respondent (No.2) delivered per Master Sweeney on the 11th April 2019

BACKGROUND

This case is an application by the Petitioner husband for ancillary relief. There is a summary, in a previous issue of the Update, of Master Sweeney's valuation judgement in this case wherein she valued the husband's company which is an Independent Financial Advice company. This hearing was necessary as the parties could not agree a valuation of the company, and the wife had not co-operated with the husband or the court in agreeing a joint valuer. The husband's business had originally run as a partnership between him and the wife's mother. The wife's mother had retired and there was an agreement between him and his business partner to pay her a sum of £120,000 in instalments which the husband had continued to pay from his income. (The court considered that £240,000 was the value of the business at that stage – 3 years before the separation.) The business underwent some changes, due to circumstances beyond the control of the husband, following the parties' separation, briefly stopped trading and recommenced as a company although with many of the same clients as had used the business partnership.

FACTS

The parties married in August 2006 and the court found that the date of separation was in July 2012 which was the date specified in the husband's undefended petition for divorce. The court described the marriage's longevity as, "relatively short." At the time of the hearing of the ancillary relief application the husband was aged 40 and the wife aged 28 years. There is one child of the family who was ten years old at the time of the hearing. She resides with the mother but has substantial contact with the father, the court finding, "the parties virtually share her care." The husband pays maintenance for the child. The court found that both parties were cohabiting (despite the wife's evidence to the contrary).

The court found that the husband's net income was somewhere between £5000 and £6000 per month and the wife's £3180 per month. The parties agreed, although for different reasons, that this was not a maintenance case.

The assets were as follows:

The proceeds of the former matrimonial home of under £3000 once cognisance was taken of debts owing to the parties' parents

The parties each had an one eighth share in a property on the Belmont Road valued together at just under £10,000

The husband's total pension CETVs were in the sum of £22,739.80

The wife's total pension CETVs were in the sum of £10,727

The husband's company which the Master had valued at £476,288

The husband's interest in a property owned jointly with his cohabitee valued at £23,850 before sale costs taken into account.

The most substantial asset was thus the husband's company. He argued in the first instance that the company was simply the source of his income and in the second instance if it was to be regarded as an asset, that it was a post-acquired asset. The wife argued that the company was an asset and not an after acquired asset as it was essentially a continuation of the same business operation.

The court considered that, "although the Company is not the original asset, neither does it have all the characteristics of an after acquired asset and I take it into consideration when taking full and fair account of the Wife's interest." However, "...it is also important to recognise that since the separation and since the Husband started the limited company, it has grown in turnover and value and as a result of the Husband's endeavours." Having regard to the case law the Master commented in relation to the valuation she had put on the company, "...the valuation is of course no indication of the fair resolution of the parties' ancillary relief claims..."

HELD

The court ordered;

- The parties were to receive 50% of the balance proceeds of sale of the matrimonial home following payment to the wife's parents of £1500 and to the husband's parents the sum of £4000
- The wife was to transfer to the husband her interest in the property in which they each had a one eighth interest in consideration of the husband indemnifying the wife against liability for the joint overdraft
- The husband was to pay to the wife a lump sum of £120,000 within two years in equal instalments every six months
- The parties would retain all other assets held in their sole names, including pensions
- The wife was to pay the sum of £5000 towards the husband's legal costs

REASONING

In relation to the costs the court found that the wife had not co-operated, despite indications to the court to the contrary, with the appointment of a valuer.

The court considered the law relating to ancillary relief applications in this jurisdiction.

In the case of *H v H (2015) NICA 77* the Court of Appeal approved Maguire J's summary of ancillary relief law in Northern Ireland:

"The following from the case law appears to be of general application:

1. There is in operation what might be described as a non-discrimination principle as between the roles performed by husband and wife. The object rather is to achieve a fair outcome as between the parties.
2. Equality of division is a useful yardstick, it should only be departed from if there is good reason for doing so. This however does not mean that there is a presumption in favour of equal division.
3. In seeking to achieve fairness between the parties the court will keep in mind the needs of the parties; the fact that compensation may be required to address any significant prospective economic disparity due to the manner in which the marriage was conducted; and the idea of marriage as a partnership of equals
4. To a greater or lesser extent, all of the above, together with all relevant factors, will need to be considered in the particular case the court is dealing with."

In the case of *S v S and ES (2016) NI Fam 2*, that approach was followed but particular regard was paid to the factors contained in Article 27(2) of the Matrimonial Causes (NI) Order 1978.

In the present case the Master confirmed that the starting point would always be the factors contained in Article 27(2) of the Matrimonial Causes (NI) Order 1978.

The Master also drew reference to a seminal case in this area of law, *Miller v Miller; McFarlane v McFarlane (2006) 1 FLR 1186* in relation to matrimonial and non-matrimonial assets in that case Baroness Hale commented, "...there was a reason to depart from the yardstick of equality because those were business assets generated solely by the husband during a short marriage. Whether one puts this as a result of the contacts and capacities he brought to the marriage or as a result of the nature and source of the assets generated...it comes to the same thing."

The case of *B V B (2008) EWCA Civ 543* is authority for the pre-eminence of the factors contained within the English equivalent of our Article 27(2) of the Matrimonial Causes (NI) Order 1978. Wall LJ commented in that case, "...In every case the court just ask itself two questions: (1) is the outcome fair in all the circumstances of the case? and (2) is it in any way discriminatory? Of course the court must follow White and look at the extent to which the court departed from equality. But in my judgment, this latter exercise is a check: the primary objectives remain fairness and an absence of discrimination..."

In all the circumstances, the court made the order outlined above.

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND FAMILY DIVISION

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

BETWEEN: WA, Applicant and KA, Respondent, delivered per Keegan J on the 11th January 2019

FACTS

The applicant mother was seeking a residence order and leave to remove the children of the family, a girl aged 8 and a boy aged 3 years, to live with her permanently in America. The parents are married, the mother is American and the father from Northern Ireland. The mother's evidence was that the parties had always discussed that the children would be brought up in America, the father did not agree with that evidence, although did agree that there were various conversations about living in America throughout the marriage. In any event, the father's mother suffered from dementia and both parties were very much involved in caring for her in Northern Ireland. She died in December 2017. The father suffered from mental health difficulties and had suffered a stress reaction after the parties' daughter was born. The mother's evidence was that she was the primary carer as the father could not cope with the children, she could not even have a social life as the father was unable to look after them even for a short period of time while she was out. This was a stress on the relationship between the parties.

In March 2017, various issues arose with the mother's family in America and she really wanted to go to be with them and discussed this with the father. The agreement between the parties was that she would go to America for a month in July. The mother, however, wanted to move to America with the children of the family, to support her family, have their support and be more financially secure. The parties could not agree on this move however and the father obtained an emergency prohibited steps order in August 2017 to prevent the mother taking the children to America. After that, however, the parties came to an agreement that

the mother would take the children to America for a trial period from September 2017 until June 2018. This occurred and the mother's evidence was that she obtained a good job and accommodation for herself and the children and that they were settled and happy there. The father visited America regularly during this period and the court indicated that this showed his commitment to the children of the family. The mother's wished to remain in America with the children after the trial period and brought a court application in the Family Proceedings Court in Northern Ireland seeking the court's leave to relocate to America with the children. Meantime the children remained with her in America until a return order was made under the Hague Convention in America.

The court's comment was that in cases such as these, an emergency application for relocation should be brought to the High Court. This had not happened and due to the intervening Hague Convention proceedings the children had been separated from their mother and were living with the father, suffering stress as a result.

The Official Solicitor was appointed to carry out a report on the children's wishes and feelings. She did not interview the boy considering that he was too young but did interview the daughter. "...She confirmed when I asked her that she loves both her parents but added 'I would rather be with my mummy'". She wanted the adults, however, to make the decision about her future care.

During this time, although without a full realisation on behalf of the father on the effects on the children of the situation, the parties agreed that the mother would move back into the matrimonial home and the father would move out. A second report from the Official Solicitor reported on good contact between the father and the children of the family.

The court accepted the mother's evidence at the hearing that she was the primary carer for the children due to the father not being, "hands-on", although had perhaps slightly exaggerated his mental health difficulties. The court also accepted the mother's evidence that, "life in the USA was good." On the other hand, the court considered that the father exaggerated his involvement in the care of the children and was not impressed by the state of the home when he was living in it by himself and subsequently the children of the family. The father did accept that the mother's motivation for going to America was good but his case was that his contact with the children would necessarily be severely curtailed by any such move.

HELD

This case was described by the Official Solicitor and by the court as a "finely balanced" one. In all the circumstances, however, the court made an order permitted the mother to relocate to America with the children of the family.

REASONING

The court considered the law in relation to relocation cases. In Northern Ireland, the leading case in relocation is the Court of Appeal case of *SH v RD (2013) NICA 44*, where the court had regard to the case of *Payne v Payne (2001) Fam 473*. The case of Payne and cases subsequent to it all confirmed that the overriding principle in relocation cases is that the welfare of the child is paramount. "There was no presumption that the reasonable relocation plans of the carer will be facilitated unless there is some compelling reason to the contrary." The court considered that in such cases the court must look at the welfare checklist in reaching a decision about the child's welfare and, "It must also be borne in mind that cases such as these engage the Convention and the rights of various parties including the children."

The present case was one of recent separation which had not been handled well. The mother was the primary carer and likely to remain so. Both parties had good motives, the mother's plans to move were well thought out and the children would have a good life in America, on the other hand, the father's objections to relocation were completely understandable, he would not have as much contact with the children of the family if they moved away. In this case there was no medical evidence on behalf of the mother of the effects on her if her application to relocate with the children was refused. On the other hand, there was some medical evidence, in relation to the father's mental health problems and he would suffer from anxiety if the children were to move, although he was a person who had a history of seeking help with these sorts of problems.

The court went on to consider the welfare checklist in relation to these children. The most pertinent of these in this case were:

Any harm which he has suffered or is at risk of suffering:

Here the court considered that the children may suffer emotional harm if they had to live in a stressful environment which would be the case if they remained in Northern Ireland. On the other hand, there was a risk of them suffering emotional harm if they did not have meaningful contact with their father which would be the case if they went to live permanently in Northern Ireland.

How capable of meeting of his needs is each of his parents and other person in relation to whom the court considers the question to be relevant?

The mother in this case is the more capable and is the primary carer.

On the facts in this case, while a finely balanced decision, the court felt the balance was tipped in favour of the mother being permitted to relocate to America with the children of the family. "...primarily because I believe the mother, who is the primary carer, can offer the children a better life there which is more secure and where she has family support. By contrast...life in Northern Ireland would involve greater hardship and stress for the children."

Subject to various conditions, including an arrangement providing for good contact between the children and their father, the court made an order granting the mother leave to relocate to America with the children of the family.

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

**BETWEEN A HEALTH AND SOCIAL CARE TRUST, Applicant and M and D, Respondents,
delivered per Her Honour Judge McReynolds, on the 26th February 2019**

FACTS/BACKGROUND

This was an application by the Trust for a full care order with respect to a male child aged 2 years and five months at the date of hearing who was six weeks old when he was removed from his parents. The respondents are the parents of the child. The child was removed from the parents in circumstances where they had attended twice at hospital with the child who had been, on the parents' report, 'floppy' on the first instance of attending and, 'vomiting and floppy,' on the second hospital attendance. On the first occasion, the parents had been sent home with the child with advice to decrease the volume of feeds and increase their frequency. On the second occasion, the child was suffering from seizures to the extent that a CT scan was carried out. This revealed bi-lateral subdural haemorrhages and a right

sided intraventricular haemorrhage. Healing fractures were also noted. These two things in combination gave rise to concerns that the child may have been subjected to 'abusive traumatic injury.'

Subsequent to this, the parents were interviewed by the PSNI. It was accepted by the parties that they were the only people in the pool of potential perpetrators.

The Trust were seeking a full care order and had set out draft threshold criteria which included details of the injuries the child had suffered, that these were non-accidental in nature and caused by an adult carer, that the child would have suffered pain and distress as a result of these injuries which would have been obvious to the person causing the injuries and to any other person present when the injuries were caused, injuries were caused on at least two occasions, the baby was in the care of the respondents during both these periods and one or other had caused the injuries, the parent who had not caused the injuries failed to protect the baby from harm, had prioritised their relationship with the child's parent above the child's needs and welfare and that the father had misused cannabis including when he was responsible for the child's care.

Both parties accepted the list of injuries, that they were non-accidental and inflicted by an adult carer, the expert view in relation to how the injuries were caused and that the baby would have suffered pain and distress due to the injuries which would have been obvious to the person causing the injuries. The mother accepted that any person present when the injuries were caused would have known that they were causing the child pain and distress but did not accept that she was in fact present when the injuries were caused and that she was upstairs in bed sleeping at the time. It transpired in evidence that the mother often slept for substantial periods of the day, leaving the child in the care of his father. There was evidence before the court that the father had an extensive habit of taking cannabis, the mother knew about it but perhaps not the full extent of it. The father had accepted, during police interviews, that he had had this habit since 11 and up until the baby was hospitalised.

HELD

The court considered that the threshold criteria were made out save that the mother was not physically present when the father caused the injuries to the child, that she had failed to show insight into the significance of the child's injuries or that she had prioritised their relationship over the child's needs. However, the court considered that it was unreasonable for her to leave the child in his father's care for those periods of time with knowledge of his cannabis habit and some knowledge of his sleep patterns rendering him incapable of looking after the child. It was recommended that care planning take place in this case in early court and that it should be listed before the Family Judge for consideration of whether a care order should be made on the basis of a care plan.

REASONING

The court had to be satisfied to the appropriate standard (on the balance of probabilities) that either parent had perpetrated the injuries and or that either parent failed to protect the child and if so, to what extent that parent fell short of sufficiently protective parenting.

The court had substantial evidence before it including medical evidence, police statements, police interview transcripts, social work reports, and contact records. The court also heard oral evidence from the other and submissions from Counsel.

The medical evidence was agreed by the parties and was clear as to the extent of the injuries and that these were non-accidental in nature. On the first occasion of the parties attending

at hospital with the child no health professional noted any sign of non-accidental injury and this was relevant in relation to whether any person not present at the time of the injuries being caused would have known about them.

On the nights preceding presentation at each hospital visit the mother said that the father had done the 'night shift' which was not denied by him.

In a medical report in relation to the brain injury it was stated, "The perpetrator would be likely to realise that the changing behaviour had occurred as a result of their actions... but because of the non-specific nature of the change in behaviour a carer who had not witnessed the causative event whilst they might recognise that there had been a change in behaviour they would not necessarily ascribe that change to a traumatic event..." In relation to the fracture of the tibia there was medical evidence, "...If a carer had not been present when the injury occurred it would not be readily apparent in the short period afterwards as indeed it was not apparent until revealed by the x-ray examination."

The extent of the father's cannabis habit was revealed through examination of the father's telephone records. While the mother accepted that the father had such a habit following this being revealed to her, she had not always accepted it. During interview by the police she said that, "she could not tell the difference between the father being high and not being high because he was "clearly" high all the time."

The mother's sleep pattern was concerning.

In making findings of fact, the judge reminded herself of the need for caution in these sorts of cases. There are rarely independent, competent witnesses and parents may lie to cover up embarrassing behaviour which does not mean they are lying about the real issues in the case.

The court also had regard to the case of *In Re H & R (Child Abuse: Standard of Proof)* (1996) AC 563 where the House of Lords had set out guidelines on the standard of proof necessary in deciding whether threshold criteria are made out:

- a. A court can only act on evidence in the case
- b. Whoever makes the allegation of abuse undertakes the burden of proving it
- c. The standard of proof is the balance of probability but "the more serious the allegation, the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it
- d. The court should only act on those facts which are so proved but of course the court may rely on all proved facts (however trivial in themselves) in coming to an overall conclusion.

In the present case, the court was satisfied that the injuries to the child were caused by his father, that the mother was aware of the father's cannabis habit and had a sleep pattern which meant he could not provide good enough night time care on the frequent occasions this was delegated to him.

Sufficient threshold criteria were proved to enable the Family Judge to go on to consider whether a care order was appropriate in this case in all the circumstances.

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
FAMILY DIVISION**

OFFICE OF CARE AND PROTECTION

BETWEEN:

A FATHER, Applicant and A HEALTH & SOCIAL CARE TRUST and A MOTHER, Respondents, per His Honour Judge McFarland, sitting as a High Court Judge, delivered 4th January 2019

FACTS/BACKGROUND

The case concerned two children, a girl aged 11 and a boy aged 6, at the time of hearing. The mother was the mother of both children and the father was the boy's natural father although had treated the girl as his own child and she regarded him as, "daddy".

There were care orders in place with respect to both children, made in April 2014, with care plans that the girl remain living in her current long term foster placement and the boy be freed for adoption, placed in his current foster placement. Threshold criteria, determined at the time the care orders were made, included, "an inappropriate level of care, significant neglect, abuse and supply of drugs with involvement in criminal activity, ...a complaint by the girl of physical chastisement by the father, ..a failure on the part of the parents to co-operate with a safe care plan, a failure to show ..insight into the effect of their behaviour on the children,.... aggression towards professionals, prioritisation of their own lifestyle choices over the needs of the children."

At various stages following the making of the care order, the parents had presented separately and then as a couple.

There were various applications before the court:

An application for discharge of the care orders with respect to both children of the family by the father.

An application by the mother for discharge of the care order with respect to the girl and an application for increased contact with both the girl and the boy

An application by the mother under the Human Rights Act 1998 in relation to the Trust's decision to remove the daughter from her previous foster placement which was with her sibling.

An application by the Trust for an order freeing the boy for adoption

The father gave evidence at the hearing and the mother did not, although had attended at court for a part of the proceedings. There was also expert evidence given on the father's behalf from Sean Magee of Action Mental Health, from Cathy Donnelly an independent social worker and from Dr Robert Davidson. The father argued, that since the making of the care orders, he had bettered himself and made significant improvements in his life to the extent that he would now be in a position to look after the children. He had maintained regular and good contact with the children under arrangements where he saw them twice per month. The Trust accepted that his contact had been both consistent and of good quality. The Guardian ad Litem had obtained a joint report from Dr Michelle Kavanagh, a consultant clinical psychologist and Dr Jo Hewitt and education, child and adolescent psychologist. This was an assessment of the boy, about his present and future needs.

During the course of the proceedings, the mother sought leave to withdraw her application under the Human Rights Act and the father sought leave to withdraw his application to discharge the care order with respect to the girl.

HELD

The court granted leave to the father to withdraw his application for a discharge of the care order with respect to the daughter and dismissed his application for a discharge of the care order with respect to the son.

The court dismissed the mother's applications to discharge the care order with respect to the girl and for increased contact with both the girl and the boy.

The court dismissed the mother's application under the Human Rights Act 1998.

The court dismissed the Trust's application for an order freeing the boy for adoption.

REASONING

As regards finding of facts in the case the court considered the evidence before it.

In relation to any improvements made by the mother, while she had filed various written statements for the purposes of hearing, she did not give oral evidence. The court considered that the girl needed a very stable life, given the number of placements, including her parents and various foster placements and the fact that she would be moving schools from primary to secondary school. The mother was being assessed by various experts in the Republic of Ireland in relation to other children who were the subject of care proceedings in that jurisdiction. In a report from social workers in the Republic of Ireland, it was stated, "The mother has shown time and time again that she has the ability to care for her children however she cannot seem to consistently maintain any substantial level of change for an extended period of time and this brings into question her parenting capacity." The court considered the mother had not made any significant improvements in lifestyle to alter her position since the making of the care order.

The court accepted that the father had made significant improvements in his lifestyle since the date of the care orders and that his contact with both the boy and the girl had been consistent and of good quality. This was borne out by evidence given by Sean Magee from Action Mental Health who described that father as "exceptional" in relation to the progress had had made and in relation to his attendance at sessions. Professor Robert Davidson had assessed the father at the time of the making of the care orders and more recently. His evidence was very positive on the father's behalf and he considered that the father was in a position **now** to care for the child and should have the chance so to do. His opinion was backed up by Cathy Donnelly who observed a contact session between the father and the boy, and noted the boy's joy during this and also noted that the father would have some support in caring for the boy from his parents.

The GAL's report from Dr Kavanagh and Dr Hewitt did not dispute that the father had made significant improvements in his lifestyle but Dr Kavanagh considered that the boy should remain with his present foster parents as the father's improvements and lifestyle changes were in the "early stages". "It is the author's view that....such a move is not indicated. It would trigger devastating consequences for the boy, not least to his relationship with his father." The father would require to continue to do work before a placement with him could be facilitated taking perhaps 12 months of work. The court found that the boy was vulnerable and had suffered harm as a result of his upbringing but was now in a stable placement. Unfortunately, there was no evidence from the GAL as to the boy's wishes and feelings, however the court was able to ascertain from other evidence that he was settled in his current placement and in school and that he enjoyed contact times with his father.

The court considered the law in relation to each of the applications:

Discharge Application

Article 58 of the Children (Northern Ireland) Order 1995 provides that circumstances in which a care order may be discharged. It requires that any person who has parental responsibility

for a child can apply for this, which of course means that the father's application with respect to the girl for discharge could not have proceeded. (There would have been other means of effecting a discharge by way of an application for leave to apply for a residence order.) In any event however the father had applied for leave to withdraw that application which was granted by the court. The burden of proving that a child's welfare requires revocation of a care order is with the person applying for the discharge, cf *Re S (2002) NI Fam 26*. In the case of *Re S (Discharge of Care Order) (1995) 2 FLR 639* the court indicated that it was clear from the legislation that the child's welfare was the paramount consideration and required the welfare checklist to be considered. It is the present circumstances and welfare of the child which must be considered and the emphasis was on the likely effect of any change of circumstance on the child. The case of *Re C (Care: Discharge of Care Order) (2009) EWCA Civ 955* indicates that in considering discharge of a care order the court must not use the exercise as a reprimand or punishment to a child. The court in the present instance considered that the exercise of the court's jurisdiction regarding discharge should not be used to reprimand any party to the proceedings, including the father and the Trust. The welfare of the child being the paramount consideration is the principle which follows through in all of the case law. In *AR v Homefirst Community Trust (2005) NICA 8*, the mother's human rights had been wrongfully infringed upon but, "...We are reluctantly driven to the conclusion that the disruption to his young life that would come about by his being taken from that environment is such that we cannot sanction it."

In the present case, taking into account all the evidence and the law, while the father had made significant changes to his lifestyle which were to be commended, the court considered that he had not proved that the boy's welfare required the care order to be discharged.

Adoption proceedings

In the present instance, the Trust's application was for an order freeing the boy for adoption which would inevitably result in a breaking of legal ties between his parents and himself and a reduction of contact between he and his parents.

The primary legislation in Northern Ireland is Article 9 of the Adoption (NI) Order 1987. This indicates that the child's welfare is the most important consideration and that adoption must be in the best interests of the child. If it is established that adoption is in the child's best interests, then the court must go on to consider whether one of the grounds outlined in Article 16 of the Adoption Order has been established. In the present instance, since the parents had not formally consented to adoption taking place, the court had to consider whether each parent was withholding their consent unreasonably.

In looking at the best interests of the child, the court drew reference to both English and Northern Irish case law in the area, albeit accepting that the law in relation to adoption in England and Northern Ireland had diverged in 2002.

In the case of *AR v Homefirst Community Trust (2005) NICA 8* it was stated by Kerr LCJ, "the removal of a child from its parents is recognised...as a draconian measure, to be undertaken only in the most compelling of circumstance."

In *Re B (a child) (2013) UKSC 33*, it was stated, "a decision as to whether a particular outcome is proportionate involves asking oneself, it is really necessary?"

In the cases of *Re: W (A child) (2016) EWCA Civ 793* and *Re: H (A child) (2015) EWCA 1284* McFarlane LJ was "firm in his rejection of ... a concept" that there should be no presumption in favour of a child being brought up by his natural family. In the *Re : W* case, "The only right is for the arrangements for the child to be determined by affording paramount consideration to her welfare throughout her life in a manner which is proportionate and compatible with the need to respect any Article 8 rights which are engaged." (NB English cases where paramountcy principle is key.)

In considering whether a parent is withholding their consent unreasonably, the court had regard to the case law including *Re W (an infant) 1971 AC 682* where Lord Hailsham laid out the correct approach, followed in subsequent cases.

Higgins J in the case of *Re E & M (2001) NI Fam 2* set out various examples of things a reasonable parent would take into account in making the decision whether or not to consent to an adoption order being made, "...the prospect of rehabilitation, the level of contact if any, the nature and security of the present placement of the child. The prospect of rehabilitation is relevant as is the failure of the parent to seek rehabilitation." In that case Higgins J indicated that a sense of grievance against Social Services was not in itself a legitimate thing for the reasonable parent to take into account however, "the facts giving rise to that sense of grievance are relevant and would and should be taken into account by a reasonable parent, " and, "The welfare of the child is not the sole criteria. It is one of the criteria a reasonable parent would take into account and the weight to be attached to welfare will depend on the weight which a reasonable parent would attach to it in the circumstances of the particular case..." This case, finally dealt with by the House of Lords and known there was, *Down and Lisburn H & SS Trust v H (2006) UKHL 35*, also noted that the issue of contact between a child and their parent was something that that parent could take into account in making their decision as to whether or not they would consent to adoption.

In the present case the court did not consider that the best interests of the child were served by adoption. The GAL's joint assessment report had indicated that the father had a contribution to make to the boy's life and indeed to his recovery from his previous experiences. If his legal rights were removed and he had less contact with the boy, the father would not be in a position to make this contribution. Any significant change in the arrangements for contact would also be to the detriment of the boy's welfare and the court could not guarantee, in the event of adoption, that these would not be significantly altered.

Technically the issue of parental consent was not one for the court, given that the best interests of the child were not served by adoption, however, the court went on to consider these in brief. The main reason was the regular and good contact between the boy and the father. Even though rehabilitation was not immediately viable (or perhaps even within the boy's timescale), the father had improved his lifestyle significantly. There was also an issue in relation to his sense of grievance about the way in which the Trust had dealt with his case surrounding the boy's baptism into the Catholic church. The court considered that the Trust had not given the father time to properly consider proposals made in this regard. "Social workers appear to have made a decision to allow the foster carers to present the boy for adoption, and having made that decision imposed a strict and unrealistic timetable on the parents to respond to their demands relating to the baptism..." The factors leading up to the father's sense of grievance were ones which a reasonable parent would take into account when making a decision about whether or not to consent to an adoption taking place.

In all the circumstances the court refused the Trust's application for an order freeing the boy for adoption.

**PILOT SCHEME -
FAMILY DRUG AND ALCOHOL COURT AT NEWRY FAMILY PROCEEDINGS COURT**

Shane Donnelly, LL.B, Solicitor¹

This pilot scheme was rolled out in the Southern Trust area in late January 2018 and ended in December 2019. The process is started by The Southern Health and Social Care Trust identifying Public Law cases which are then to be diverted to the pilot scheme and dealt with at Newry Family Proceedings Court.

The scheme is designed specifically to help parents with drug and alcohol problems. Its scope does include other areas that the family courts regularly see, such as mental health difficulties and domestic abuse. The programme is primarily designed for parents with drug and alcohol addiction issues which lead to the intervention of the Trust.

When a case is identified as one suitable for the FDAC process proceedings are initiated in the normal way by DLS on behalf of the Trust. A meeting is scheduled to take place in Newry Courthouse where both parents and their legal representatives meet with the FDAC team. During this meeting the process is explained to the parents highlighting the assistance that can be offered to them going forward. It is completely voluntary and parents do not have to sign up to pilot scheme and can have their cases dealt with in the normal way at Court. It is quite an intensive process which is targeted to last approximately 26 weeks.

There are a number of services that the FDAC team provide. Assessment and assistance is available straight away to any parent engaged with the FDAC team. This is certainly an advantage to a parent facing addiction or other mental health or domestic abuse problems. The availability of such professional assistance and intervention has been described in Court as the "Golden Ticket". The process is monitored and overseen personally by the Family Proceedings Judge in Newry. There are informal fortnightly meetings between the FDAC team, the parents, the Judge and the Guardian Ad Litem appointed in the proceedings. The parents legal representatives do not normally attend these informal meetings and this is something that practitioners have got used to.

The meetings themselves have been described as motivational in nature and the feedback from parents after such meetings is positive in that they feel much more involved in the Court process and appreciate that their views are being heard directly by the Judge hearing and dealing with their case. In practice clients would not always be inside the Courtroom perhaps until the very end of the process at a final hearing. Not so in the FDAC process, they are the very heart of the Court Process and get to know the Judge and other relevant parties quite well. It is quite an intensive programme with lots of intervention and work and some clients do feel the strain.

There is a formal review of each case in the normal way on a regular basis. It is important to acknowledge that if issues do arise at a meeting, and the parents do require legal assistance, the issue will be re-examined at the next scheduled review hearing at the Family Proceedings Court and parents will have the assistance of their legal representatives. All parties are kept up to date with regular progress reports detailing how the parents are progressing with the various work and assistance provided by the Trust, and there is no doubt there has been a number of successful outcomes to date.

The whole process is currently under evaluation as to whether it will receive further funding and possibly rolled out in different Trust areas. Even if the scheme is proved to have been successful or worthwhile, there is no guarantee it will be rolled out as it will be no doubt subject to an economic assessment as has been in the case in England and Wales.

¹ Ferris and Company.

