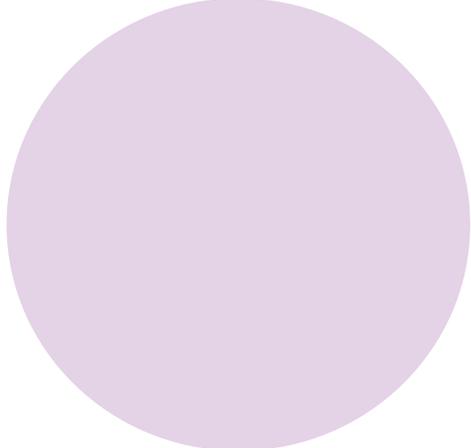
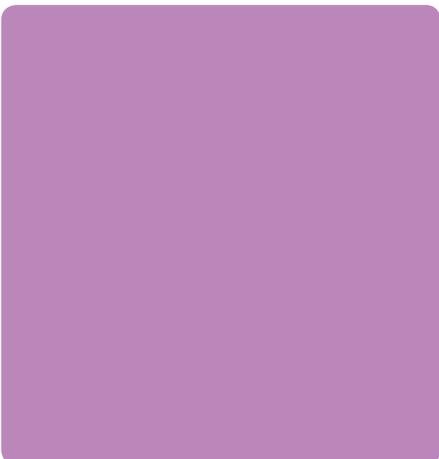
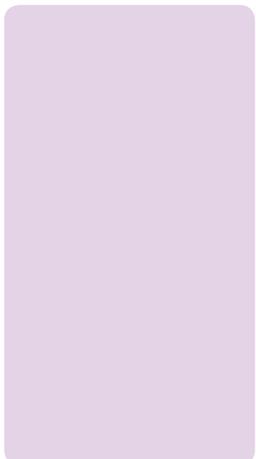




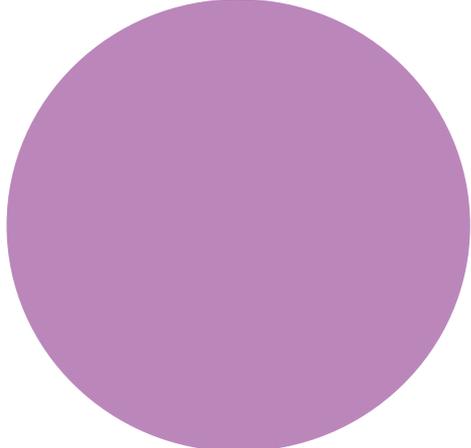
# Child & Family Law Update

Issue 45

December 2020



 **LSNI**  
*information  
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# Child & Family Law Update

Welcome to the December 2020 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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## A PANDEMIC WITHIN A PANDEMIC

**Kathryn Mullan, LLB, LLM, Solicitor<sup>1</sup>**

Since the 19th March 2020 and the imposition of 'lockdown' measures, we have seen a seismic shift in the way in which we live our daily lives. The Coronavirus Pandemic has had, and continues to have, a significant and detrimental impact not only on our health and the economy but also family life and in turn family law and the family justice system.

Being in lockdown has been extremely challenging for many families. However, for those couples who had already decided to separate or indeed where their relationship was already in a fractious state, the lockdown has acted like a pressure cooker, and for many families and individuals it has caused great stress, uncertainty and fear.

Amid the rapidly evolving COVID-19 Pandemic, parents who share custody of their children have faced and continue to face challenges. At the commencement of the 'lockdown' period, a considerable number of parents were concerned that child arrangements would not be met, and there was a fear that many would be unable to see their children due to the social distancing guidelines imposed by the Government. Initially, the Government failed to clarify the situation for those parents who either had a Court Order or a mutual Agreement regarding the contact arrangements for their children. It was unclear whether the children could travel between separate households, due to the clear directive to stay at home. Given the difficulties experienced by non-resident parents, the Government moved swiftly to address this issue, and on the 25th March 2020, Michael Gove stated:

*“When children should not normally be moving between households, we recognise that this may be necessary when children who are under 18 move between separated parents. This is permissible and has been made clear in the guidance”.*

Whilst the 'clarification' was welcomed by many families, it did not come without its difficulties. The issues surrounding contact with children subject to both private and public law proceedings has presented as one of the most turbulent seas to cross throughout the ongoing Pandemic.

The main difficulty in relation to the Government guidance and private law proceedings, was that it was at the parent's discretion to decide whether it was in the child's best interests to travel between households, taking into account the child's health, risk of infection and the presence of any vulnerable individuals within those households. Unfortunately, some parents used this situation to their advantage and weaponised COVID-19 in an attempt to prevent the non-resident parent from availing of contact with their children. Given the cessation of 'normal' Court proceedings, private and non-essential Court cases were halted, with matters being unable to be resolved for many months. Therefore, any recourse which a parent had to attempt to initiate or recommence contact on foot of a breached Contact Order was lost, thus resulting in a detrimental impact upon not only the non-resident parent, but most importantly, the child.

In considering the issues of contact for any child, the key principle is that the child's welfare is of paramount consideration<sup>2</sup> and this has long been held to apply to contact arrangements for children in care.<sup>3</sup> The local authority has the competing duties to not only 'safeguard

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<sup>1</sup> John Boston and Company Solicitors.

<sup>2</sup> Article 3 The Children (Northern Ireland) Order 1995.

<sup>3</sup> *Re B (Minors)* [1993] 3 WLR 63.

and promote' the welfare of the children in their care, including their health, but also to allow 'reasonable contact' with the child's parents.<sup>4</sup>

The main difference for children subject to public law proceedings is that, whereas separated parents are on an equal footing, the local authority has the power to overrule parents when determining the level of contact and what is ultimately in the child's best interests as per the Welfare Checklist.<sup>5</sup> One of the major issues in public law proceedings has been the practical difficulties created, such as parents who avail of supervised contact via contact centres, or with the involvement of third parties or activity based contact within the community. There were, and continue to be, many restrictions and closures of contact centres. Whilst many centres implemented innovative solutions to attempt and promote contact, they were simply unable to facilitate direct contact in light of the Government's approach. Additionally, for parents who were required to avail of contact in the community or under the supervision of third parties, the Regulations on social distancing impacted significantly upon these parents, as households could not mix, and outdoor and leisure activities were suspended, therefore making it extremely difficult for a non-resident parent to avail of meaningful contact with their children.

In the absence of the Court being able to adjudicate upon the issues of contact and the hurdles imposed by Government restrictions, the difficulty emerged, and continues to exist, as to how to deal with the practicalities of contact on a day to day basis. The wide range of circumstances and varying family dynamics make a blanket policy extremely difficult, if not impossible, to implement. Parents are essentially relying upon the good faith and common sense of the parties involved to establish and maintain regular contact between the child and the non-resident parent. The Lord Chief Justice's Office published guidance as *COVID-19 Guidance for Courts: Family Proceedings (All Court Tiers) (revised October 2020)*.<sup>6</sup> The guidance highlighted the importance of all children maintaining their usual routine of spending time with each of their parents in compliance with a Contact Order unless to do so would put the child, or others, at risk, with regards to the Government and Public Health Authority guidance in effect at that time. Where Coronavirus restrictions cause the letter of a Court Order to be varied, it was made clear that the spirit of the Order should nevertheless be delivered by making alternative arrangements for the child. If it is not possible to maintain a child's routine due to illness, self-isolation, or non-availability of, or risk to, people who ordinarily support contact, the Court has an expectation that alternative arrangements are to be made to establish and maintain regular contact between the child and the other parent e.g. via Facetime, Whatsapp, Zoom, Skype or, if that is not possible, by telephone.

Whilst the Guidance provides assistance for Practitioners in advising parents and local authorities on the issues of contact, the catastrophic issue still remains that COVID-19 has exacerbated the pre-existing pressure on the family justice system and is responsible for causing substantial delays to proceedings.

The length of delay to proceedings depends largely on the type of case that is being considered by the Court. Invariably public law proceedings involve more urgent concerns of significant harm to the children and are being dealt with on a priority basis. However, the requirements for social isolation have rendered it difficult for social workers and experts to meet with and observe those whom they are directed to assess for the purpose of preparing reports and

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<sup>4</sup> Article 29 The Children (Northern Ireland) Order 1995.

<sup>5</sup> Article 3 The Children (Northern Ireland) Order 1995.

<sup>6</sup> <https://www.judiciaryni.uk/sites/judiciary/files/media-files/COVID-19%20Guidance%20-%20Family%20Proceedings%20%28All%20Court%20Tiers%29%20-%20Revised%2023%20Oct%2020.pdf>

psychological or psychiatric assessments. Due to the reduction in social contact, cases are unable to progress and as a result, Judges face particularly difficult challenges administering justice in both private and public law proceedings. They have to determine whether it is appropriate for hearings to be conducted remotely, balanced against the delay principle, the welfare of the child and the risk of significant harm.

Private law proceedings are more likely to be adjourned unless all the necessary evidence had been filed prior to the 'lockdown', or they are considered to be urgent, taking into consideration the welfare of the child<sup>7</sup>. Those cases which require further expert evidence or await Court Children's Officer Reports are more likely to experience delays especially in a time when already limited resources are significantly stretched. Many parents in both public and private law proceedings have been awaiting referrals to organisations to undertake parenting assessments, family work and mediation, however, in light of the social distancing restrictions, these services cannot be utilised. In turn, this significantly delays the progression of the case to the detriment of both the parents and the children. Across all Health and Social Care Trusts in Northern Ireland, there are significant delays in families awaiting referrals to the Court Children's Officer. Ordinarily, there are several Court Children's Officers at the disposal of the Court, however in light of COVID-19, this has been limited, which has created a significant back log in case progression. The volume of work faced by the local authority, in addition to the absences of social workers due to the Pandemic, has resulted in a redeployment of Court Children's Officers to alternative departments within the Trust in an attempt to deal with child protection and safeguarding issues throughout Northern Ireland. This issue which is sadly occurring across all family Court tiers is impacting on many families with no 'quick fix' remedy being available.

The COVID-19 crisis has compounded the challenges that the Courts were already facing in observing statutory timetables. The current delays to proceedings are likely to have far-reaching implications for the administration of family justice, likely to extend beyond the current crisis. Increases in the number of adjourned hearings are resulting in an accumulation of cases yet to be resolved, lengthening Judges' Court lists and delaying access to justice not just for those families engaged in adjourned and ongoing cases, but also for those who wish to refer their disputes to the Court for resolution in the future. Any decision to adjourn a hearing now will therefore have resonance for access to family justice for some time to come after the current social distancing measures are relaxed and normal court hearings can resume.

Throughout the Pandemic, Court staff, Judges and family Practitioners have done their utmost in the circumstances to adapt, and a wide variety of hearings such as directions/case management, interim hearings and final hearings have been conducted remotely. The inability to hold 'normal' Court-based hearings in light of the Government guidance has significantly impacted upon the administration of justice. Whilst implementing remote access processes is an understandable solution by the Courts to the challenges posed by COVID-19, it is not without its difficulties. Due to the technology involved, there are many issues which arise such as the quality and stability of connections both in video and telephone hearings. On many occasions, connections to the Court can simply 'drop out' and individuals have to reconnect and be updated as to missed information. This is not only disruptive and frustrating to the participants involved, but there is also a risk of unfairness if the important information is missed. Given the occurrence of the technological difficulties, hearings are much lengthier and occupy much more Court time, resulting in a decreased volume of cases which can be dealt with on any given day by the Court. The knock-on effect of this is that many parties are finding that their long-awaited hearings are being adjourned at a late stage due to Judicial

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<sup>7</sup> Article 3 The Children (Northern Ireland) Order 1995.

availability and allocation of Court time. In some cases, the adjourned hearings are being listed several months down the line which is extremely unsettling for clients who are waiting for important issues to be resolved regarding their lives and their children.

Aside from the technological difficulties associated with remote hearings, there is a concern that the lack of 'face-to-face' interaction makes the assessment of an individual's body language extremely difficult, which is an important factor to take into consideration when determining a witnesses' credibility and veracity. The lack of 'face-to-face' interactions also creates difficulties for clients and Practitioners to obtain or give instructions during hearings. This is usually because there are no facilities on the video platform for private consultations, or due to video and telephone hearings being conducted without breaks, resulting in a lack of opportunities to take instructions. This can be extremely unsettling for clients if they feel that they have something important they wish to raise with their legal representative, have something valuable to add to their case or require assistance in understanding a certain issue. As a result, the participants involved may believe that they are not being permitted their right to a proper and fair hearing<sup>8</sup> before the Court.

Aside from the practical difficulties, there is no doubt that remote hearings are both impersonal and transactional rather than humane, making it extremely difficult for Practitioners and the Judiciary to conduct the hearings with the level of empathy and humanity that is an essential element of family justice.

Additional concerns have been expressed recently over the impact of the transition to remote hearings on the well-being of professionals. The *Nuttfeld Report*<sup>9</sup> identified new points of stress that remote working had placed upon lawyers and the Judiciary in the Family Courts, including additional workloads and increased levels of anxiety and tiredness due to the concentration required to undertake telephone and video hearings. Remote hearings can be an arduous experience for all involved and present more challenges than 'face-to-face' hearings. The fatiguing element of remote hearings potentially increases the risk of mistakes being made at Court, undermining trust in the new remote means of administering justice. The exacting nature of such remote hearings has already contributed to erroneous judicial decision making. In the recent case of *Re B (Children) (Remote Hearing: Interim Care Order) [2020] EWCA Civ 584*, the Court of Appeal set aside an Interim Care Order made by Recorder McCarthy QC at a telephone hearing on the 3rd April 2020. The case involved a 9-year old child who had been removed from the care of his grandmother and placed in foster care. Finding the Recorder's decision to have been 'unquestionably wrong', Jackson LJ and Davies LJ observed that it had undoubtedly been influenced by the nature of the Recorder's workload, which had involved working continuously, and mainly by means of telephone hearings, for 10.5 hours by the time the hearing on the 3rd April was concluded.

There are also serious concerns that remote access processes are having a profoundly negative impact on the manner in which vulnerable litigants are able to participate in hearings and access justice. Parents with literacy, language, cognitive, hearing and psychological difficulties find participation in digital hearing extremely difficult if not impossible. The limited access to technology and poor digital skills of many vulnerable Court users present worrying obstacles to the ability of the family Courts to ensure fairness and equality of arms. Whilst intermediaries can help to alleviate these problems, there is a significant shortage of such individuals due to a strain on resources in light of the Pandemic. Furthermore, some are yet to

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<sup>8</sup> Article 6 The Human Rights Act 1998.

<sup>9</sup> Remote hearings in the Family Justice system: a rapid consultation - Mary Ryan, Lisa Harker & Sarah Rather.

have training on how to provide remote intermediary support given the initiation of lockdown and the difficulties presented by COVID-19. The reality of the situation is that individuals can therefore be disadvantaged by a result of their disability which goes against the ethos of access to justice.

Despite the many obstacles posed by COVID-19, some professionals have highlighted the fact that remote hearings can provide an efficient means of working in certain cases, a small silver lining amidst a continuous crisis. Many Practitioners have found that availing of a scheduled Court time has permitted the case to commence and conclude in a timely manner. This is in contrast to attending Court and having to wait for several hours for the case to commence, in addition to the considerable travel time to the Court, thus allowing for more time to focus and prepare the case in advance.

Some seven months have now elapsed since we as a society entered into the unknown realm and extremely challenging life of living with a Pandemic. There are many factors which are outside of our control but new technologies have enabled us to adapt and facilitate access to family justice during these extraordinary times. Crucially, the implementation of technology has enabled the Courts to continue to manage cases and conduct hearings to ensure that the administration of justice does not grind to a halt. Unfortunately, and in spite of the best efforts of all those who contribute to the running of the family justice system, we will face long-term and insurmountable challenges. The news of the development and roll-out of a COVID-19 vaccine has been welcomed worldwide and provided a relief to society now that we can envisage and hopefully return to 'normal' life in the coming months. Despite the light at the end of the tunnel, the inevitable consequences of COVID-19 have been far-reaching and it will take a considerable period of time for the family justice system to recover and return to a semblance of normality given the backlog in cases. The reality is that COVID-19 has created a Pandemic within a Pandemic and it is a long road which we have endured and will continue to endure.

## **FAMILY PROVISION CLAIMS – A REFRESHER FOR PRACTITIONERS**

**Michael Bready, Barrister at Law**

As all practitioners know, those clients who want to make a Will with no provisions for dependants, need to be advised that such a Will may be open to challenge after death. The intended distribution may be wholly, or partly, altered by the Court upon application to the Court.

The Inheritance (Provision for Family & Dependants) (NI) Order 1979 (“the 1979 Order”) permits the Court in Northern Ireland to make such an alteration. The 1979 Order sets out the categories of person provided with the right to apply for an award out of the deceased’s estate, if the deceased fails to make “reasonable financial provision” for them.

There is no unqualified right to any individual who considers themselves to be a dependant. Those who fall within any of the categories are given merely *a right to apply* for financial provision, rather than an absolute right.

It is important to remember that, whilst the 1979 Order is very similar to the English equivalent, the Inheritance (Provision for Family & Dependants) Act 1975, it is not a carbon copy. Practitioners therefore ought to be wary when reading case law and texts in this area relating to the English legislation.

The basis of every application under the 1979 Order must be that the deceased by the disposition of his property affecting by his Will, or the law relating to intestacy, or the combination of his Will and partial intestacy, did not make reasonable financial provision for the application in question.<sup>1</sup>

The lack of reasonable financial provision is therefore a central element of such a claim. However, a different test is applied when the applicant is the deceased’s spouse or civil partner. For applicants other than a spouse/civil partner, reasonable financial position is defined as “such financial position as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance”.<sup>2</sup>

There is a more generous approach for a spouse/civil partner who must establish that the financial provision would be reasonable in all the circumstances of the case for a husband, a wife, or civil partner to receive. So, such an award is beyond simple maintenance.

### **Working out who can claim**

Practitioners should first decide what category a potential applicant falls into. In the first instance, a client can only apply under the 1979 Order when the deceased died domiciled in Northern Ireland.<sup>3</sup> Different countries have their own regimes.

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<sup>1</sup> Article 4(1) of the 1979 Order.

<sup>2</sup> Article 2(2) of the 1979 Order.

<sup>3</sup> Article 3(1) of the 1979 Order.

There are five categories of potential applicants under the 1979 Order. These categories are set out in Article 3(1) and are as follows:

**(1) The spouse or civil partner of the deceased**

An applicant falling within this category is normally easily identified and an exhaustive consideration is beyond the scope of this article, however, worthy of mention within this category is a spouse that was judicially separated from the deceased at the date of death. Unfortunately, such an applicant does not benefit from the wider interpretation of “reasonable financial provision” and is limited to a claim for maintenance.<sup>4</sup>

**(2) The former spouse, or civil partner, of the deceased who is not remarried**

A former spouse or a former civil partner is defined in Article 2(2) of the 1979 Order as follows:

“former civil partner” means a person whose civil partnership with the deceased was during the lifetime of the deceased

“former spouse” means a person whose marriage with the deceased was during the lifetime of the deceased

Both must have been dissolved or annulled<sup>5</sup> under the law of any part of the United Kingdom or the Channel Islands or under the law of the Isle of Man, or dissolved or annulled in any country or territory outside the United Kingdom, the Channel Islands and the Isle of Man by a divorce or annulment which is entitled to be recognised as valid by the law of Northern Ireland.

The effect of the jurisdictional provisions means that any applicant whose marriage was dissolved or annulled in another jurisdiction, even if the applicant argues he/she was being maintained by the deceased, may have a successful claim under the alternative category that they are “other persons being maintained by the deceased”.

It is important to remember when advising potential applicants where a significant event is looming (i.e. divorce or re-marriage), that a former spouse automatically loses the ability to claim in this category upon re-marriage.

Article 17(1) of the 1979 Order reminds practitioners of the barring effects of divorce, or nullity on the application of a former spouse.

“On the grant of a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter the High Court or a County Court, if it considers it just to do so, may, on the application of either party to the marriage, order that the other party to the marriage shall not on the death of the applicant be entitled to apply for an order under Article 4”.

Practitioners should note that the usual clauses contained within full and final agreements may mean that an applicant has contracted out of any claim, even before a divorce or the dissolution of a civil partnership. Often wording such as the following is used:

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<sup>4</sup> Article 2(2) of the 1979 Order.

<sup>5</sup> By a decree of divorce or a decree of nullity of marriage granted, or a Court Order for a civil partner.

*“That neither the Petitioner nor the Respondent shall make any claim on his or her own behalf or for his or her own benefit on the estate of the other under the Inheritance (Provision for Family and Dependents) (Northern Ireland) Order 1979 or any equivalent or substitute legislation for the time being in force in the event of that party surviving the other.”<sup>6</sup>*

In the case of an application from a former spouse or civil partner, the Court must have regard for the following as set out in Article 5(2):

- (a) The age of the applicant and the duration of the marriage; and
- (b) The contribution made by the applicant to the welfare of the family of the deceased; including any contribution made by looking after the home or caring for the family.

It is normally exceptionally difficult to show that the deceased failed to make reasonable financial provision for a former spouse. This is because a divorce and subsequent ancillary relief application will normally provide a full and final settlement.

### **(3) A child of the deceased**

This category of applicant has appeared in the press regularly, such as the child of the deceased who is forgotten within a will, or who ranks behind the deceased’s favourite charity. Practitioners should be aware of just how widely this category can extend as applicants who were adopted, illegitimate children and children in the womb at the date of the deceased’s death all fall within this category. However, a stepchild falls into the category of “persons treated as a child of the family”.

As in any claim, timing is very important and accordingly the relevant date on which the applicant achieves their standing to claim is the date of the application, **and not the death**.

Further to the foregoing, the manner in which the applicant was being, or in which he might expect to be, educated or trained, must be considered by the Court. If the deceased has not provided for a child under 18 years of age, it is not difficult to establish she/he failed to make reasonable financial provision. A claim on behalf of a child in such circumstances will normally have a high likelihood of success. Carswell J, as he then was, reinforced this concept in the case of *Re Patton*:

*“A child’s financial needs should rank very highly in order of priorities....they should normally rank well above the needs of other beneficiaries”.*<sup>7</sup>

### **(4) Any person (not being a child of the deceased) who in the case of any marriage, or civil partnership, to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage, or civil partnership**

An applicant who has been treated by the deceased as a child of the family, can apply under this category. Such an applicant must be treated as a child to a marriage, or a civil partnership. Article 3(d) states as follows:

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<sup>6</sup> Wording of such a clause varies between practitioners and some agreements have two or three clauses giving effect to these provisions, however the net effect upon a 1979 Order claim is the same.

<sup>7</sup> [1986] NI 45.

“any person (not being a child of the deceased) who, in the case of any marriage, or civil partnership, to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage, or civil partnership.”

All that the applicant has to prove, to establish they fall within this category, is that they were treated as a child of the deceased and it is enough that it was only the deceased that treated them this way.

Where the applicant was found by the Court to be treated as a child of the deceased’s family, the following matters must be considered, pursuant to Article 5(3) of the 1979 Order:

- (a) The manner in which the applicant was being, or in which he might expect to be, educated or trained;
- (b) Whether the deceased has assumed any responsibility for the applicant’s maintenance and, if so, the extent to which the deceased assumed that responsibility and the length of time for which the deceased discharged it;
- (c) Whether, in discharging that responsibility, the deceased knew that the applicant was not his own child;
- (d) The liability of any other person that maintained the applicant.

**(5) Any person (not being included in the categories (a)-(d) above) who, immediately before the death of the deceased, was being maintained either wholly or partly by the deceased.**

For an applicant to fall into this potentially very broad category, a claim is based on actual dependency, rather than any relationship with the deceased.

“any person (not being a person included in sub-paragraphs (a) to (d)) who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased.”

It can be a very confusing class of applicant, since it can extend from platonic friends to “secret lovers”. Such secrecy is less of a trend these days, but in the past claims were often made by applicants who had “socially unusual” relationships, or simple platonic friendships.<sup>8</sup>

For applicants found by the Court to fall within this category, the Court must have regard to the following, pursuant to Article 5(4):

- (i) The extent to which and the basis upon which the Deceased assumed responsibility for the maintenance of the applicant;
- (ii) The length of time for which the deceased discharged that responsibility.

This is a much broader category than any of the others; indeed applications have arisen out of platonic relationships and housekeeping relationships which were often referred to as the “mistress’s charter”.

Applicants who consider themselves to fall within this category have an additional hurdle to overcome in their claim, in that they have been maintained by the deceased. Article 3(2) of the 1979 Order states as follows:

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<sup>8</sup> See *Jelley –v- Iliffe* [1981] Fam 128 on the provision of rent-free accommodation for a platonic friend of the deceased.

“...a person shall be treated as being maintained by the deceased, either wholly or partly, as the case may be, if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money’s worth towards the reasonable needs of that person.”

In the case of *Kenneth Paul King v The Chiltern Dog Rescue, Redwings Horse Sanctuary*<sup>9</sup>, the Court of Appeal in England and Wales had to reconsider the situation where the person claiming ‘maintenance’ had also been providing ‘services’ to the deceased immediately prior to the death. The facts of the case were that Mr King went to live with his aunt in 2007 – he had a place to live and ‘subsistence’ from his aunt and she had someone to care for her, as she grew older. On the aunt’s death, Mr King claimed that she had transferred her house to him by a *donatio mortis causa* (a deathbed gift). Alternatively, if she had not made such a gift, he claimed that he fell within section 1(1)(e) of the English Act, that he had been maintained by his aunt before her death. The aunt had no children, but was involved in helping several animal charities and had made a Will dividing the bulk of her estate between several such charities. Given that the aunt was providing Mr King board and lodging and essentially supporting him in return for Mr King being her ‘carer’, the Court had to assess whether there was a dependence by Mr King on the aunt. The Court of Appeal agreed with the assessment of the Judge at first instance that Mr King had more benefit from the arrangement than his aunt did, and that he was dependant on her. Further, the provision by the aunt of board and lodgings for her nephew was held to amount to ‘maintenance’.

Article 3(1) also has the (perhaps obvious) requirement that the potential applicant survives the deceased, and therefore an action cannot be continued by a deceased applicant’s personal representatives. However, if an Order is already existing at the time of death, it can be enforced by the personal representatives.<sup>10</sup>

### **What is reasonable financial provision?**

After identifying the appropriate category under which an applicant may claim, the next question is what is the reasonable financial provision that should be provided.

Ultimately, the Court in such claims must make a determination of what is reasonable financial provision. Sheena Grattan, BL explains the test to be as follows:

“The ordinary standard of reasonable financial provision which applies to applicants other than surviving spouses, means such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance. The test is now that it is such reasonable financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that pro- vision is required for his or her maintenance. This change was made because restricting spouse applicants to a claim for maintenance could result in a widow or widower being less well off than if the marriage had terminated in divorce rather than death. This is considered to be a more generous standard.”<sup>11</sup>

Save for a mention in Articles 2(2) and 3(1) the 1979 Order has not defined exactly what maintenance should, or could, be. The Courts in England and Wales undertook to do so given the legislative silence and Goff LJ in the case of *Re Coventry*<sup>12</sup> stated as follows:

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<sup>9</sup> [2015] EWCA Civ 581.

<sup>10</sup> Section 14 of the Law Reform (Miscellaneous Provisions) Act NI 1937.

<sup>11</sup> “Succession Law in Northern Ireland” (1996), SLS Publications (out of print).

<sup>12</sup> [1979] 3 All ER 815.

*“..what is proper maintenance must in all cases depend on all the facts and circumstances of the particular case”<sup>13</sup>*

This raises a very important point note when advising on claims pursuant to the 1979 Order generally. All such claims are always very fact-specific, there are rarely two cases with the same factual matrix.

When considering the limitations of maintenance and that as a concept it was broad, Lord Hughes in the case of *Ilott v The Blue Cross & others*<sup>14</sup> said as follows:

*“..it cannot extend to any or everything which it would be desirable for the claimant to have.”<sup>15</sup>*

So, managing the expectations of clients when they are instructing what maintenance they want, is crucial. The concept is such maintenance that is reasonable in the circumstances, not what they would have expected to have been bequeathed.

The situation of the disappointed child who lost out to charity was highlighted in the case of *Ilott v The Blue Cross & others*.<sup>16</sup> In this appeal to the Supreme Court the facts sadly reflected lifelong estrangement between the deceased mother and daughter which lasted 26 years until the mother’s death in 2004 at the age of 70. As a result of this the deceased made no provision for her daughter in her Will, a decision made around the Spring of 1984. A letter of her wishes written at the same time of the Will stated as follows:

*“She did not get in touch with me and I heard from her husband’s parents that she had a baby boy. When I heard about this, I visited her in hospital and took flowers and brought up her perambulator and other presents. However, she made herself very unpleasant and wished to have nothing to do with me. Therefore, she receives nothing from me at my death.”<sup>17</sup>*

Another Will and similar letter from 2002 made it clear that the sentiment continued.

Goff LJ in *Re Coventry* set the standard for consideration of a deceased’s statement of wishes:

*“Indeed, I think any view expressed by a deceased person that he wishes a particular person to benefit will generally be of little significance, because the question is not subjective but objective. An express reason for rejecting the applicant is a different matter and may be very relevant to the problem.”<sup>18</sup>*

The Learned Judge went on to suggest that maintenance should be paid by way of lump sum, rather than by way of periodic payments.

*“The level at which maintenance may be provided for is clearly flexible and falls to be assessed on the facts of each case. It is not limited to subsistence level. Nor, although maintenance is by definition the provision of income rather than capital, need it necessarily be provided for by way of periodical payments, for example under a trust. It will very often*

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<sup>13</sup> Supra cit at page 819.

<sup>14</sup> [2017] UKSC 17.

<sup>15</sup> Supra cit at paragraph 14.

<sup>16</sup> Supra cit.

<sup>17</sup> Supra cit at paragraph 6.

<sup>18</sup> *Re Coventry* supra cit at page 819.

*be more appropriate, as well as cheaper and more convenient for other beneficiaries and for executors, if income is provided by way of a lump sum from which both income and capital can be drawn over the years.”<sup>19</sup>*

It cannot be emphasised too strongly that the role of the Court is not to undertake a full-scale re-writing of the Will, nor will the Court want to address the objective question of whether the testator acted reasonably. The only issue for the Court is whether if, considering objectively, reasonable financial provision was made for the applicant in question. This was further clarified in *Illott v Blue Cross & Others*:

*“The condition for making an order under the 1975 Act is that the will, or the intestacy regime, as the case may be, does not “make reasonable financial provision” for the claimant .... Reasonable financial provision is .... what it is “reasonable for [the claimant] to receive”, either for maintenance or without that limitation according to the class of claimant. These are words of objective standard of financial provision, to be determined by the court.”<sup>20</sup>*

When assessing whether or not reasonable financial provision has been made for any particular applicant, the Court will then consider a number of matters which are set down in Article 5 of the 1979 Order:

- (a) General matters, which remain constant and must be considered in all applications; and
- (b) Specific matters which are prescribed for consideration for each particular category of applicant.

The proper approach of the Court in assessing whether or not to make an Order has two parts:

- (1) It must consider whether its reasonable financial provision has been made; and
- (2) If the answer to the second question is in the negative, it must determine what Order should be made.

On both occasions the question should be answered by considering the various matters which are prescribed by Article 5 of the 1979 Order.

The Supreme Court in *Illot*<sup>21</sup> affirmed this test, as set out in the case of *In Re Coventry* by Oliver J:

*“In order to enable the court to interfere with and reform those dispositions it must, in my judgment, be shown, not that the deceased acted unreasonably, but that, looked at objectively, his disposition or lack of disposition produces an unreasonable result in that it does not make any or any greater provision for the applicant - and that means, in the case of an applicant other than a spouse for that applicant’s maintenance. It clearly cannot be enough to say that the circumstances are such that if the deceased had made a particular provision for the applicant, that would not have been an unreasonable thing for him to do and therefore it now ought to be done.”<sup>22</sup>*

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<sup>19</sup> Supra cit at paragraph 15.

<sup>20</sup> Supra cit at paragraph 16.

<sup>21</sup> Supra cit at paragraph 18.

<sup>22</sup> [1980] Ch 461 at 474-475.

## What are the general matters to be considered in all applications?

The Article 5 matters that must be considered irrespective of the class of the applicant are as follows:

- (a) The financial needs and resources of the applicant, including those likely in the foreseeable future;
- (b) The financial needs and resources of any beneficiary under the estate;
- (c) The obligations and responsibilities which the deceased had towards the applicant;
- (d) The size and nature of the net estate and the effect any Order might have on a business undertaking;
- (e) Physical or mental disorders with any applicant or beneficiary;
- (f) Any other matter, including conduct, which in the circumstances the Court considers relevant.<sup>23</sup>

In 2019, McBride J maintained in *Noble v Morrison & ors* that the Court must apply the aforementioned Article 5 factors to both “traditional questions”: (i) has there been a failure to make reasonable financial provision and, if so; (ii) what Order ought to be made?<sup>24</sup>

However, McBride J went on to crystallise the guidance from *Ilott* in respect of the 1979 Order as follows:

*“...there is a lack of guidance in respect of the application of the Article 5 factors. As appears from the 1979 Order, Article 5 does not rank the matters to be taken into consideration. Accordingly, the weight to be attached to each of the matters depends upon the facts of each case. In some cases, one or two factors may have magnetic or even decisive influence on the outcome.*

*Therefore, in determining whether threshold is met and if so, in determining what order the court ought to make, the court should adopt a broad brush approach having regard to the fact that each case is fact specific. According to the Supreme Court the trial judge should set out the facts and then deal with the two traditional questions sequentially, whilst taking into account the Article 5 factors in respect of both questions.”<sup>25</sup>*

## Cohabitees

When advising cohabitees who find themselves in the category of applicant, practitioner should be aware that a cohabitee, who has lived in the same household with the deceased and they have lived as man and wife for the whole of the two years immediately prior to the deceased death, may make a claim. Article 3(1A) provides as follows:

*“...if the deceased died after the coming into operation of the Succession (Northern Ireland) Order 1996 and, during the whole of the period of two years ending immediately before the date when the deceased died, the person was living-*

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<sup>23</sup> Article 5(1).

<sup>24</sup> 2019] NICCh 8 at paragraph 49.

<sup>25</sup> Supra cit at paragraph 51 and 52.

- (a) in the same household as the deceased; and*
- (b) as the husband or wife of the deceased.”*

The effect of this amendment is to make it easier for cohabitants to make a claim for reasonable financial provision. The two-year test requires that the deceased dies after the enactment of Succession (Northern Ireland) Order 1996, namely 20th February 1997.

### **Time limits for applications**

As in any litigation, practitioners must be aware of time limits and applications pursuant to the 1979 Order come with very short time limits. An application under the 1979 Order must be made within six months of the date in which the grant of representation is first taken out, unless the leave of the Court is obtained.<sup>26</sup> An application is made when the summons is issued.

The “*Megarry Guidelines*” set out the factors for consideration by a court if an application is made late.<sup>27</sup> These factors have been approved in Northern Ireland by Murray J in the case of *Campbell v Campbell*<sup>28</sup> and more recently by Horner J in *Moffat v Moffat*.<sup>29</sup> These are concisely set out in Sheena Grattan, BL’s text as follows:

- (a) The discretion is unfettered by any statutory provisions, but must be exercised judicially, in accordance with what is good and proper;*
- (b) The time limit is a substantive provision laid down by statute and not a mere procedural one which can be extended with the indulgence generally accorded to procedural time limits. The onus is on the applicant to show that there is a substantial case for the Court to exercise its discretion to extend this time limit;*
- (c) Consideration must be given to how promptly after this time limit had expired that permission is being sought;*
- (d) It is relevant whether or not any negotiations have been commenced within the time limit;*
- (e) It is relevant whether or not the estate had already been distributed;*
- (f) It is relevant whether, if permission to extend the time limit is not granted, the applicant would have any form of redress against anyone else.<sup>30</sup>*

Then a seventh element was added by the High Court of England and Wales in the case of *Re: Dennis*<sup>31</sup> that an applicant must establish “that he has an arguable case, a case fit to go to trial, and that in approaching the matter the Court’s approach is rather the same as it adopts when considering whether a defendant ought to have leave to defend in proceedings for summary judgment”

Horner J sent a stark reminder to practitioners when considering making a late application in the case *Moffat v Moffat*:

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<sup>26</sup> Article 6 of the 1979 Order.

<sup>27</sup> Set out in the case *Re: Salmon* [1980] 3 All ER 532.

<sup>28</sup> (1982) 18 NIJB.

<sup>29</sup> [2016] NICH 17.

<sup>30</sup> *Supra* cit, at paragraphs 8.17 and 8.18.

<sup>31</sup> [1981] 2 All ER 140.

*“It is essential that parties appreciate that extensions of time are not granted as a matter of course. The onus remains throughout on the applicant to show that there is a sound basis upon which the court should exercise its discretion to extend the time limit.”<sup>32</sup>*

### **What property is available for financial provision claims?**

The property available to meet any family provision award is the net estate of the deceased. This can include property held by the deceased as a joint tenant and which would otherwise pass automatically to the surviving joint tenants.

Article 12 of the 1979 Act enables any property which has been disposed of within six years of death, with a view to defeating a family provision claim, to be taken back into the estate. Property disposed of within six years of death can only be considered if the Court is satisfied that:

- (a) The deceased made a disposition less than six years before death;
- (b) Full valuable consideration was not given;
- (c) The disposition was made with the intention of defeating an application for financial provision; and
- (d) That exercising such powers which facilitate the making of a financial provision for the applicant under the Order.

Article 12(6) sets out the circumstances the Court must take into consideration when exercising its power after finding that a disposition was made that was intended to defeat an application under the 1979 Order:

*“..the court shall have regard to the circumstances in which any disposition was made and any valuable consideration which was given therefor, the relationship, if any, of the donee to the deceased, the conduct and financial resources of the donee and all the other circumstances of the case.”*

### **A summary of the issues for a claim under the 1979 Order**

McBride J in *Noble v Morrison & ors* said that the Court should determine the following questions sequentially:

- (i) Does the plaintiff have *locus standi* to bring a claim?;
- (ii) If so, what is the extent/nature of her claim?;
- (iii) Has the threshold been met, that is has the deceased failed to make reasonable financial provision for the plaintiff’s maintenance?;
- (iv) If the threshold is met what Article 4 Order or Orders ought to be made by the Court?; and,
- (v) What consequential or supplementary court orders or directions ought the Court to make?<sup>33</sup>

This is also a helpful checklist for any practitioner, when advising a client considering a claim pursuant to the 1979 Act. Above all, practitioners must manage their client’s expectation of such a claim and temper these with the stark reality of the case law.

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<sup>32</sup> Supra cit. at para 11.

<sup>33</sup> Supra cit at paragraph 59.

## INTERNATIONAL CHILD ABDUCTION AND THE HAGUE CONVENTION<sup>1</sup>

**Amy Kinney, Barrister at Law**

International child abduction happens all too frequently. It involves taking a child from one country to another without the permission of either or all those with parental responsibility for the child or the permission of the Court. Abductions tend to be carried out by one parent without the consent of the other or by other family members, rather than abduction by a stranger which is a matter processed through the criminal courts. Usually the case is one of wrongful removal of a child from the jurisdiction, however keeping a child in another jurisdiction beyond the period for which permission was originally given also constitutes a child abduction. Child abduction cases are an area where many practitioners will have their first dealings with international law. Applications require speed and efficiency as they are usually urgent in their nature. The majority of child abductions involve countries which are signatories to the Hague Convention.

This article aims to provide guidance on the procedure and basic principles of Hague convention cases. Usually where the countries involved are within the remit of the European Union the regulation commonly known as Brussels IIR is applicable. However, with Brexit lurking in the background Brussels IIR has been revoked by the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019 . This means that Brussels IIR will only continue to apply in the UK up until the end of the transition period, which is currently due to finish on the 31st December 2020. After this point, and provided the transition period is not extended further, Brussels IIR will no longer apply to any new cases brought in Northern Ireland and the UK will rely on the Hague Convention for cases of international child abduction<sup>3</sup>. For this reason, I will focus this Article on the principles of the Hague Convention.

The Child Abduction and Custody Act 1985 gives effect to the Hague Convention in British law<sup>4</sup>. Under the Hague Convention each signatory country agrees that if a child is abducted to that country, it will not enter into a full investigation of custody, contact or other matters but will leave that to the Court where the child was last habitually resident. The country to which the child was abducted will merely secure the safe and prompt return of the child.

### **The application**

Where a child is residing with one parent (A) and is taken by the other parent (B) to a different country, without A's consent, then A will need to apply to the Courts of the country to which the child was taken for an order that the child should be returned.

Parent A should go to the Central Authority and provide them with all available information about the child. The Central Authority, whether it is the Central Authority of the country where the child was last habitually resident or of another country, will assist A in securing the return of the child<sup>5</sup>. In Northern Ireland the Courts and Tribunals Service discharges the function of the Central Authority.

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<sup>1</sup> Convention on the Civil Aspects of International Child Abduction, 1980.

<sup>2</sup> Regulation 3, Revocation of Council Regulation No. 2201/2003.

<sup>3</sup> Chapter 3 of the DOJ Guidance on Family Law involving the EU, <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/guide-legal-practitioners-family-cases-post-tp.pdf>

<sup>4</sup> Section 1 of Child Abduction and Custody Act 1985.

<sup>5</sup> Article 8 of the Hague Convention.

If a child has been abducted to Northern Ireland, then an application should be issued in the Office of Care and Protection in the High Court. Proceedings are brought by way of originating summons and affidavit<sup>6</sup>.

The Hague Convention imposes a strict time limit on the courts under which they must act expeditiously. In Article 11 it states that;

*“If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of the commencement of the proceedings, the applicant [...] shall have the right to request a statement of the reasons for the delay”.*

Often when an abduction case gets before a Judge there are applications for interim orders or safeguards. If parent A has not seen the child for some time the Court may make arrangements for contact whilst the proceedings are ongoing. If there is a concern that parent B will try to abscond with the child when he or she is made aware of the application, a direction may be made for parent B to hand the child’s passport into Court or the Court may make an order preventing parent B from moving the child from where they are currently residing. Interim orders can be made at any time before the application is determined and should be *“for the purpose of securing the welfare of the child or preventing changes in circumstances relevant to the determination of the application”*<sup>7</sup>.

### **When does the Hague Convention apply?**

For the Hague Convention to apply the child who is sought to be returned must be under the age of 16 and must have been habitually resident in a Contracting State immediately before being wrongfully removed or retained<sup>8</sup>.

There is no precise definition of the term habitual residence. However, the issue was discussed by Keegan J in the case of *VS v GA*<sup>9</sup>. Keegan J refers to Baroness Hale’s comments in the case of *Re A*<sup>10</sup>. The following principles emerged;

- Habitual residence is a question of fact and not a legal concept. Baroness Hale states, *“the essentially factual individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce”*<sup>11</sup>.
- The preferred test is that which is adopted by the European courts. The test is that *“the place which reflects some degree of integration by the child in a social and family environment in the country concerned. This depends on numerous factors, including the reasons for the family’s stay in the country in question”*<sup>12</sup>.
- Other factors that should be taken into consideration include the length of time spent in the “new” Member State. Parental intent may also be considered along with the degree of stability of the child<sup>13</sup>. In a recent decision it was emphasised that Courts should consider the circumstances at the date of the wrongful removal or retention when deciding on the issue of habitual residence<sup>14</sup>.

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<sup>6</sup> O. 90 of the Rules of the Court of Judicature (NI) 1980 .

<sup>7</sup> Section 5 of Child and Custody Act 1985.

<sup>8</sup> Article 4 of Hague Convention.

<sup>9</sup> [2016] NIFam 8 at paragraph 26.

<sup>10</sup> *Re A (Jurisdiction: Return of Child)* [2013] UKSC 60.

<sup>11</sup> *Ibid* at paragraph 54.

<sup>12</sup> *Ibid* at paragraph 54.

<sup>13</sup> (n 8) at paragraph 27.

<sup>14</sup> *M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention)* [2020] EWCA Civ 1105.

## Wrongful removal or retention

Article 3 of the Hague Convention details when the removal or retention of a child is to be considered wrongful;

*The removal or the retention of a child is to be considered wrongful where –*

- a) *it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and*
- b) *at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.*

*The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.*

The definition for rights of custody includes the rights and duties relating to the care of a child and in particular the right to determine the child's place of residence<sup>15</sup>.

Whether the child has been wrongfully removed to a country or wrongfully retained in a country will depend on when or if parent A consented to the child being in that country. A wrongful removal is where parent A never consented to the child leaving the country of habitual residence. A wrongful retention is where parent A consented to the child leaving the country of habitual residence but with the expectation of them returning. The child is wrongfully retained if parent B refuses to return them. This is common where two parents live in different Member States or where parent B has family in another Member State and the children are going to visit.

## The presumption of return

Under Article 12 of the Hague Convention there is a presumption that where a child has been wrongfully removed or retained (pursuant to Article 3) and it is less than a year from the date of wrongful removal or retention the courts "*shall order the return of the child forthwith*"<sup>16</sup>. Furthermore, even when the period of one year has expired, the court "*shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment*"<sup>17</sup>.

If the Court is satisfied that the child was habitually resident in the Member State of parent A and has been either wrongfully removed or retained, then there is a clear requirement for the immediate return of the child. The Court does not have a discretion. The law requires a return of the child and that return should be made promptly. As is reflected in the defences available to parent B the duty is on the parent seeking the return of the child to act swiftly.

It is possible to challenge any request for the return of a child. Once it is shown that the child was wrongfully removed or retained the burden of proof shifts and the onus then lies with the person who is opposing the child's return. This parent must show that the child should not be returned pursuant to Article 13 of the Hague Convention which provides for a number of defences.

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<sup>15</sup> Article 5(a) of the Hague Convention.

<sup>16</sup> Article 12 of Hague Convention.

<sup>17</sup> *ibid.*

## Defences

Even if a parent is able to prove that a defence is in play, this does not create an automatic barrier to the return of the child. Rather it provides the Court with a discretion to refuse the return. Simply put, a required return becomes a discretionary return. Again, this highlights the underlying preference for the return of the child in this area of law.

There are only a limited number of circumstances where the Court is not bound to return the child. Article 13 provides that;

*“Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –*

- a) *the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or*
- b) *there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.*

*The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.*

*In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child’s habitual residence.”*<sup>18</sup> [writer’s emphasis].

I will take each defence in turn.

### 1. Exercising custody rights

The wronged parent has to be exercising rights at the time of removal or retention. A parent is still exercising their custody rights even if they are not actually having day-to-day care and control, provided the parent is still maintaining a stance of such a parent<sup>19</sup>. It was highlighted in the New Zealand case of *Ryan v Phelps*<sup>20</sup> that the “Convention is concerned with ‘rights of custody’ and not with ‘custody’”.

### 2. Consent/acquiescence

Article 13(a) deals with the exception where the plaintiff consented to or acquiesced in the removal or retention of the child. The difference in the concepts of consent and acquiescence is timing, that is, consent is before the removal or retention and acquiescence follows it<sup>21</sup>.

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<sup>18</sup> Article 13 of the Hague Convention

<sup>19</sup> A Practical Guide to International Family Law, *David Hodson*, page 261.

<sup>20</sup> [1999] NZFLR 865 paragraph 20 and 21.

<sup>21</sup> *In the matter of G and A*, [2003] NI Fam 16 Paragraph 23(5) Gillen LJ.

Any consent must be “real” and there must be “positive and unequivocal giving of consent”<sup>22</sup>. In the case of *Re PJ (Abduction: Habitual Residence: Consent)*<sup>23</sup> Ward LJ summarised that;

*“consent to the removal of a child must be clear and unequivocal...the ultimate question is a simple one even if a multitude of facts bear upon the answer. It is simply this: had the other parent clearly and unequivocally consented to the removal”.*

The leading authority on acquiescence is *Re H (Minors)* [1998] AC 72. In this case, Lord Browne-Wilkinson concluded that “*acquiescence is a question of the actual subjective intention of the wronged parent, not of the outside world’s perception of his intentions*”<sup>24</sup>. It was also noted that the Judge hearing the case “will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent and evidence of his intention.”<sup>25</sup>

Gillen LJ considered the case of *Re H* in his case of *G and A*<sup>26</sup>. He commented that whether a plaintiff’s behaviour amounts to acquiescence will also depend on the circumstances of the case and whether in the circumstances Parent A has “gone along” with the abduction<sup>27</sup>. Acquiescence must amount to Parent A essentially, accepting the situation post-abduction<sup>28</sup>. Although the length of time of inaction after an abduction is relevant<sup>29</sup>, there has been no guidance from the court as to a minimum period of time which would indicate acquiescence.

### 3. Grave risk

Article 13(b) provides another exception where there is a grave risk that on the return of the child they would be exposed to physical or psychological harm or placed in an intolerable situation. The case law makes it clear that there is a hurdle to be passed in relation to this defence and that the threshold is high.

In *Re E (Children) (Abduction: Custody Appeal)* [2011] 2 FLR 758, the court considered Article 13(b) and established the following points:

- The burden of proof is on the person opposing the child’s return. (para 32)
- The Court held that there is no need for a “gloss” on the wording of Article 13. That “by its very nature, [Article 13] is of restricted application”.(para 31)
- They also held that the risk must be “grave” and that it is not enough that the risk be “real”. “It must have reached such a level of seriousness as to be characterised as grave. Although grave characterises the risk rather than the harm, there is in ordinary language a link between the two.” (para 34)
- The Court considered what amounts to an intolerable situation. They found that intolerable is to mean “a situation which this child in these particular circumstances cannot be expected to tolerate”. (para 34)

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<sup>22</sup> Ibid at paragraph 23(3)

<sup>23</sup> [2009] 2 FLR 1051 paragraph 48

<sup>24</sup> *Re H (Minors)* [1998] AC 72 at page 15

<sup>25</sup> Ibid at page 17

<sup>26</sup> (n 20)

<sup>27</sup> Ibid at paragraph 23(6)

<sup>28</sup> Ibid at paragraph 23(5)

<sup>29</sup> Ibid at paragraph 23(5) citing *Re A (Minors) (Abduction: custody rights)* [1992] Fam 106 at 119

- “Article 13b is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country...” (para 35)
- The Court also notes that “importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place.” (para 52)

In *RM v KM*<sup>30</sup>, Mr Justice Maguire summarised the legal position in this jurisdiction with reference to the *Re E* decision.

In child abduction cases this defence is heavily relied upon, despite the difficulties that defendant’s may face in passing its high threshold. A distinction is drawn in the case of *Re E* between an intolerable situation and the everyday “rough and tumble” that a child may have to face. The plain discomfort of a child may not be enough to pass the threshold. Although this defence is commonly pleaded the threshold is not often met.

#### 4. Child’s objections

Article 13 of the Hague Convention provides that a Court may refuse to return the child if it finds that the child objects.

In *RM v KM*<sup>32</sup> Mr Justice Maguire referred to the case of *H v K and Ors (Abduction)* [2018] 1 FLR 700, quoting MacDonal J as follows<sup>33</sup>:

- (i) *The gateway stage should be confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views.*
- (ii) *Whether a child objects is a question of fact. The child’s views have to amount to an objection before Art 13 of the 1980 Hague Convention will be satisfied. An objection in this context is to be contrasted with a preference or wish.*
- (iii) *The objections of the child are not determinative of the outcome but rather give rise to a discretion. Once that discretion arises, the discretion is at large. The child’s views are one factor to take into account at the discretion stage.*
- (iv) *There is a relatively low threshold requirement in relation to the objections defence, the obligation on the court is to ‘take account’ of the child’s views, nothing more.*
- (v) *At the discretion stage, there is no exhaustive list of factors to be considered. The Court should have regard to welfare considerations, in so far as it is possible to take a view about them on the limited evidence available. The Court must give weight to the 1980 Hague Convention considerations and at all times bear in mind that the 1980 Hague Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned and returned promptly.*

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<sup>30</sup> [2018] NI Fam 11

<sup>31</sup> *Re E (Children) (Abduction: Custody Appeal)* [2011] 2 FLR758 at Paragraph 34

<sup>32</sup> (n 29)

<sup>33</sup> Paragraph 59

He continued that once the exception comes into play the Court may have to consider:

*“the nature and strength of the child’s objections, the extent to which they are: ‘authentically her own’ or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier.”<sup>34</sup>*

A child’s objections should be to being returned. It is not enough for the objections to be based simply on a child’s preference to be with one parent over the other<sup>35</sup>. Where a parent abducts a child, it would not be uncommon for that child to adjust to being in that parent’s care. They may have half-siblings that they enjoy spending time with or that parent may be in a position to indulge them more. However, the question the Court should consider is not where the child would prefer to live but whether the child objects to being returned to the country of habitual residence. If the Court was to answer the first question, they risk muddying the waters between deciding matters of custody, which should be left for the country of habitual residence and securing the prompt return of the child, which is their sole purpose.

Nonetheless there are a wide range of considerations to be taken into account in children’s objection cases and where a child’s objection is proved, the Court has a discretion as to whether or not to order the return of the child.

### **Protective measures**

Before a Court exercises its discretion and makes a non-return Order, it should consider what protective measures could be put in place to allow the child to be returned.

When considering potential measures to impose, the Court should be alert to the fact that it is not up to it to make a decision in relation to the welfare concerns of the child. That decision is for the court in the country of habitual residence. Keegan J in the case of *VS v GA*<sup>36</sup> refers to the case of *Re E (Children (Abduction: Custody Appeal))* [2011] UKSC 27 and comments that in that case;

*“the Court reiterated that whilst the best interest of the child or children concerned is a primary consideration this does not mean that the welfare of the child or children must be propelled to a level where it becomes the Court’s paramount consideration. The Court reiterated the point that these are summary proceedings, and the policy of dealing with cases with expedition is established...”<sup>37</sup>.*

In *Re JA (an Order under the Child Abduction and Custody Act 1985)*<sup>38</sup> Lord Glennie stated;

*“The Hague Convention, particularly when read with Brussels II, emphasises the trust to be placed in the Courts of the country to which the child is returned to put in place appropriate protective measures to deal with any difficulties which the children may experience on their return[...] in C v C (Abduction Rights of Custody) [1989] 1 WLR 654, the Master of the Rolls made these observations in the last paragraph of his judgment:*

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<sup>34</sup> Ibid at paragraph 59.

<sup>35</sup> *Re R (a child) (abduction: child’s objections to return)* [2009] EWHC 3074, paragraph 64.

<sup>36</sup> (n 8) paragraph 24.

<sup>37</sup> Ibid.

<sup>38</sup> [2011] ScotCS CSOH\_215 at paragraph 38.

*'It will be the concern of the Court of the State to which the child is to be returned to minimise or eliminate this harm and in the absence of compelling evidence to the contrary or evidence that it is beyond the powers of those Courts in the circumstances of the case, the Courts of this country should assume that this will be done. Save in an exceptional case the concern of these Courts should be limited to giving the child the maximum possible protection until the Court of the other country can resume their normal role in relation to the child.'*"

In the recent case of *Re K (a child: Hague Convention: Child Abduction)*<sup>39</sup>, Keegan J found that the threshold for grave risk had been met and the defence under Article 13(b) made out. Keegan J considered the need for protective measures and undertook substantial judicial liaison with the Hague Network Judge in the country of habitual residence. Unusually, a return order was made subject to a number of conditions that had to be in place before any return of the child. Keegan J noted that;

*"I wish to highlight some points of practice which arose in this case and which may also apply in other cases in this area. The first point relates to the efficacy of protective measures. Given the facts of this case where domestic violence features so heavily I am particularly alert to the need for the measures to actually be in place prior to return. Traditionally, undertakings have been offered to courts in Hague Convention cases. However, these are based upon trust. Given the circumstances of this case it is clear to me that the protective measures must actually be in place in the receiving country prior to and upon return."*<sup>40</sup>

A question remains where no defences are made out and there is a decision or agreement to return the child. If there is such a case can the Court require that protective measures are put in place and make a return order subject to a number of conditions? This may arise where there is some level of risk or harm but not enough to meet the high threshold of grave risk. A Court may feel that to protect the child, measures should be put in place. However, if no defence is made out then the Court is required to order a return pursuant to Article 12 of the Hague Convention. Of course, there is always the ability of the parties to agree protective measures by way of undertakings but where no agreement can be reached the Court must order the return of the child without stepping in to impose certain conditions.

## **Conclusion**

Child abduction cases are always distressing and very difficult for all of the parties concerned. This does not exclude the lawyers, who are charged with delivering speedy results in an area which requires a high degree of specialisation. There will often be complex family dynamics in play and frequently the supposedly guilty party who has abducted a child will claim they have very real reasons for doing so. Quick and effective action is central to any proceedings under the Convention. With the increased movement of people throughout the world there has been a huge increase in the number of families who have connections with more than one country. This area of work is only likely to increase in the future and, indeed, may become even more complicated as the United Kingdom exits the European Union. It is important that family law practitioners have a clear grasp of the underlying principles of the international legal rights in play, together with a knowledge of the practical procedural steps required to address the needs of clients in this area.

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<sup>39</sup> [2020] NIFam 9.

<sup>40</sup> Ibid at paragraph 30.

## **PARENTAL ALIENATION - CAN THE COURTS COME TO THE RESCUE?**

**Aidan Hughes, Barrister at Law**

Everyone will recall the 2004 ‘superheroes’ campaign lead by the organisation ‘Fathers4Justice.’ One of the groups biggest protests was when two members of the organisation dressed as Batman and Robin and scaled the walls of Buckingham Palace, taking over the balcony, to make their voices heard. This particular campaign generated international publicity for the group, inspiring imitation groups in a host of other countries as well as opening the door to a number of documentaries and books.

The group’s mission statement is ‘*We stand for the human rights of mothers, fathers and children,*’ as summarised by their founder, Matt O’Connor. The group was founded in retaliation to Mr O’Connor’s experiences going through the family court system. His experience is summarised on the Fathers4Justice website as follows;

*‘Fathers4Justice was founded by Matt O’Connor in 2001 after he was denied access to his two boys following a difficult divorce. A design, marketing and PR consultant, Matt was shocked by the cruel, degrading and inhuman treatment of dads in Britain’s secret courts.*

*Forced into a contact centre to see his boys as part of a “cooling off” period – imposed by a judge after his wife had prevented him going to his house to remove his belongings – Matt was left fighting depression after losing everything....*

*Refusing to take any further part in court proceedings in protest at being treated like a criminal, Matt told a judge in the Royal Courts of Justice that the treatment of fathers in the family courts was a violation of their right to family life and that he no longer recognised their authority.*

*Turning his back on the court, as Matt walked out, a court welfare officer pleaded with him not to walk away. Two weeks later he was reunited with his children after the courts and his wife backed down, and a consent order was agreed allowing Matt to re-establish a normal relationship with his boys.*

*Despite the resolution of his own case, Matt founded Fathers4Justice, a campaign born out of his love for his children, and his fear that one day they might suffer the same injustice as him – what he called a “living bereavement” – when they became fathers.*

*Helped by another dad, Tony Lewis, Matt set about raising awareness of the crisis in Britain’s family justice system and the cancer of family breakdown and mass fatherlessness.’*

Most family law practitioners will be familiar with the views which are expressed in this short snapshot as more and more parents are vocalising similar thoughts and feelings. ‘Parental alienation’ and ‘implacable hostility’ are terms which are now widely used in the family court arena. They usually go hand in hand and are used interchangeably. In situations like this the main questions posed to family law practitioners are;

- What are the courts going to do about this?
- Why is he/she allowed to get away with this?

- Why is he/she allowed to do this to our child?
- Why can't anyone see this is emotional abuse?

Over the past twenty years a lot of campaign and lobbying groups have assisted in putting the spotlight on these issues and people are more aware of what parental alienation actually is, what it looks like on the ground and the effect that it can have on families.

Like everything the terms can, of course, be over-used and some parents may claim the likes of alienation or hostility when they are dissatisfied with an outcome or things don't go the way they would have hoped in terms of the contact/residence arrangement. They may also be used by the parent who feels aggrieved at things not moving as quickly as they might like in cases where there are genuine concerns about domestic violence, addiction issues or other various child protection concerns which may lead the court to place restrictions on contact. This overuse of the terms can sometimes undermine or diminish what has become a very serious, increasing and complex challenge to solve.

A key and increasingly difficult task for family law practitioners is how to first identify cases of parental alienation and secondly how to manage these cases through the court system. The Children & Family Court Advisory Support organisation ("CAFCASS") define parental alienation as '*when a child's resistance or hostility towards one parent is not justified and is the result of psychological manipulation by the other parent.*' They go on to provide examples of behaviour indicators in alienating parents and the effects which such may have on the children. Such has been included below;

*'Behaviour indicators in alienating parents;*

1. *Derogatory comments.*
2. *Suggesting the non-resident parent presents a danger.*
3. *Bringing the child into the dispute as a confidant.*
4. *Obstructing or mitigating contact;*
  - a) *Active interference i.e stopping calls*
  - b) *Making it a child decision and scheduling other things i.e. school clubs*
  - c) *Creating scenarios to mitigate the quality i.e. telephone calls in front of the tv with the child's favourite show, or in a busy family room*
  - d) *Encouraging the child to not want contact and praising or promoting the rejecting behaviour*
5. *Reframing the NR's parents' legitimate actions as wrong, or nasty. i.e. shouting or reprimanding the child.*
6. *Not recognising, or rejecting, any positive comments or behaviours regarding the targeted parent.*
7. *Creating an unnecessary level of dependency between the child and the alienating parent.*

*Behaviour indicators in children;*

1. *Increasingly negative focus on the alienated parent and presenting unjustifiably one-sided views.*
2. *Lack of ambivalence – talks openly and without prompting as to the rejected parent's shortcomings.*
3. *Illogical level of negativity in response to behaviour; eg. vilification of a parent for a minor (and appropriate) punishment or slight mistake.*
4. *Verbal presentations not matched by behaviour; eg. saying scared of parent before contact, then having a positive contact and showing no fear*

5. *Making comments closely aligned as to parent's comments.*
6. *Revises history to eliminate or diminish the positive memories of the previously beneficial experiences with the rejected parent. May report events that they could not possibly remember.*
7. *Claims to be fearful but is aggressive, confrontational, even belligerent.'*

It falls on the shoulders of the family law practitioner to identify whether their cases have any of the above indicators and whether or not the arising problems are insurmountable. It goes without saying that the above lists are non-exhaustive and also have a sliding scale in terms of seriousness. The cases of concern usually have a vast number of the points noted above. Persistent allegations and disclosures are another common feature. If it is believed that the case has hallmarks or indicators of implacable hostility or parental alienation, it is common practice to flag these to the Court's attention at the earliest opportunity. This will then allow the Court to issue directions and have a fact-finding hearing if required and at the earliest convenience. The question then becomes - what can the Court actually do about it and is it enough?

### **1. Contempt Proceedings**

The Family Proceedings Court has limited powers of enforcement. This becomes problematic when a Contact Order is made and there are repetitive breaches. Obtaining a Contact Order is one thing, however making it stick and run effectively for all, is a different challenge altogether. The terms of the Contact Order may break down after a period of time, relatively quickly or they may never get off the ground at all.

In order to get assistance of the Court a contempt summons needs to be issued for failure to adhere to the terms of a Court Order. As with other contempt proceedings a very black and white approach can be adopted to disposing of them, mainly did the breach happen or did it not? If the breach happened then the offending party is in contempt of court. Such an application has criminal implications for the accused party and this could amount to a fine or at the most extreme, imprisonment. In practical terms such punitive consequences aren't commonly imposed.

Family proceedings are different from criminal court orders or other civil orders. More often than not the party who hasn't abided by the Order will come to Court with an explanation; for example; the child doesn't want to go, they can't force the child to go, the other parent said or did something to cause upset or distress to the child, allegations or disclosures have been made, other issues arising which may be of a child protection nature, the other parent said or did something which breached the order, etc... These explanations and disputes may often present hallmarks of hostility and will often lead to the contempt summons being adjourned to allow the other party to lodge proceedings to vary the previous Contact Order. This will allow them access to the Court Children's Officer to assist with further investigations or to address issues which have been raised which may require a fact-finding hearing. If the contempt summons is issued whilst the proceedings are ongoing the issues raised are often then dealt with in the substantive proceedings. The contempt summons will more often than not be adjourned alongside.

A contempt summons in the Family Proceedings Court can only go so far in cases of implacable hostility or parental alienation. If the Court decides that the Order has been breached then the question becomes what is the solution. The punishment which is most likely to be awarded is a fine, however, if it is too high it may cause financial detriment to the child and the primary care giver, but if it is too low it doesn't act as a deterrent to abide by the terms of the Order. The thought of having a criminal record is likely to be more of a deterrent in this respect. This

can explain why some may believe that such an application has 'no teeth' and it simply leads to further delay.

The main concern in cases involving hostility and alienation are that the overarching issues still persist and haven't been addressed. They are likely to arise again, exposing the child to repetitive and increased litigation. The Courts are in a difficult position in so far as they have to consider whether they focus on the one breach or on the overall attitude to contact and the child's relationship with the non-resident parent. The latter is the more complex and difficult question, which undoubtedly takes more time and effort to get to the bottom of.

## **2. Transfer to a Higher Court / Attaching a Penal Notice to the Order**

One of the most common applications to be made in the Family Proceedings Court when it is thought there is a case involving an implacably hostile parent is for transfer to the Family Care Centre on the grounds of said hostility, in order to get a Penal Notice attached to the Contact Order. A transfer recognises the seriousness and complexity of the issues involved in cases where such problems arise and that stricter enforcement measures may be required. It is also often hoped that the transfer may help the hostile parent recognise the seriousness of the situation and prompt a change in attitude. In many cases the parent is so entrenched in their position that this is unlikely to have any effect.

The Higher Courts have the power to attach a Penal Notice to any Contact Order. This is essentially a warning attached to a Court Order specifying that if the said party fails to comply with the terms of the subject Court Order, they will be held in contempt of court. If the said party then fails to comply with the Order, the other party may apply for a Committal Order against them for breach. If the Court is satisfied that such a breach has occurred, penalties such as large fines or periods of imprisonment may be imposed.

The High Court in England provided some guidance as to what the Court would need to consider when making a decision as to whether a party was in contempt of a Contact Order. Albeit this test isn't binding, it still provides a useful insight when considering how the Family Law Courts in this Jurisdiction consider such matters. *In the Matter of an application by Her Majesty's Solicitor General for the committal to prison of Jennifer Marie Jones for alleged contempt of court* [2013] EWHC 2579 (Fam) the test the High Court followed was;

- “1. *What was she required to do?*
2. *Could she do it? Was she able to do it?*
3. *Has the Solicitor-General established that it was within the power of the mother to do what the order required?*
4. *The standard of proof is the criminal standard, so that before finding the defendant guilty of contempt the judge must be sure (a) that the defendant has not done what she was required to do and (b) that it was within the power of the defendant to do it.*
5. *If the judge finds the defendant guilty the judgment must set out plainly and clearly (a) the judge's finding of what it is that the defendant has failed to do and (b) the judge's finding that he had the ability to do it.”*

In deciding what enforcement action to take or indeed if enforcement action is required the Family Court has to conduct a balancing exercise based on the Welfare Checklist and what is in the best interests of the children as per Article 3 of the Children (NI) Order 1995. The Court has to decide whether imposing a fine or a custodial sentence on the resident parent is ultimately in the best interests of the child. It could be argued that a large fine imposed on a family with already limited means may place them into financial hardship which could have a detrimental effect on the child. If a custodial sentence is imposed this could have the

effect of firstly leaving the child without a primary caregiver and usually their main source of attachment but may also further entrench the child's view of the non-resident parent, as the perception will be that they have sent their parent to prison.

The Court is very much in a catch-22 situation. If enforcement action is taken it could make matters worse for the child but if nothing is done the Family Justice system is seen to be weak and 'toothless.' The balancing exercise which is conducted often results in the non-complying parent to be given numerous chances to adhere by the contact terms in the hope that their attitude will change. This can often cause frustration and delay for the non-resident parent who usually often doesn't get to see their child for lengthy periods of time.

### **3. Transfer of residence**

One of the duties of the resident parent is to facilitate contact with the non-resident parent in order to allow the child to have a regular and consistent relationship with both the mother and the father. If this isn't facilitated, the Courts also have the power to transfer residence to the non-resident parent. In the case of *V v V* [2004] EWHC 1215 both children, aged eight and six, resided with their mother. There was long-standing and protracted litigation which resulted out of the father's application for contact. The mother regularly suspended and restricted the contact, not complying with the terms of any orders imposed. The reasons she gave varied and included allegations about the children's welfare and that they had supposedly suffered sexual abuse by a relative whilst in the father's care. After fact-finding hearings occurred the Court ultimately rejected the mother's claims. Applying the Welfare Checklist the Court concluded that;

- *"The girls wanted to stay with their mother. However, an outcome could not be determined because they had been tainted by their mother's influence.*
- *The children could benefit in the longer term from a change of circumstances.*
- *The use of enforcement procedures such as penal notice may have the effect of causing the mother to deliver contact. But, this would not prevent her from continuing to position the children's minds against their father."*

Historically transfer of residence was seen as a method of last resort and quite a draconian measure. More recently the Courts have suggested that this shouldn't be the perception and that a transfer of residence should be seen as a possibility and an option in cases where contact simply isn't being facilitated by the resident parent for no apparent reason.

In the more recent case of *Re L (A Child)* [2019] EWHC 867 (Fam) the Court held that the child's future emotional needs wouldn't be met by remaining in the placement with the mother and the maternal grandmother. The mother and the child resided in London, whilst the father lived in NI. The child was 8 years old when the final order was made. Proceedings had been going on for six years, had resulted in 12 different Orders being made and had been before ten different Judges. There were numerous allegations made against the father, which resulted in fact-finding hearings where no findings were made against him. A number of professionals were involved to include various CAFCASS officers, social workers and the Court had allocated a Guardian. It was concluded that parental alienation was a feature of the case and that such amounted to emotional abuse of the subject child. At the final hearing the Court conducted a balancing exercise and concluded that any harm by transferring residence to the father and by the child relocating from London to NI would be "worth incurring" given the absence of any substantial chance from the mother and the maternal grandmother who was also a prevalent force in the child's life. The Court subsequently transferred residence. The mother appealed the decision and such was dismissed.

At paragraph 59 the President of the Family Law Division referred to the test provided for in *Re A: (Residence Order)* [2009] EWCA Civ 1141;

*“Having considered the authorities to which I have referred, and others, there is, in my view, a danger in placing too much emphasis on the phrase “last resort” used by Thorpe LJ and Coleridge J in Re: A. It is well established that the court cannot put a gloss on to the paramountcy principle in CA 1989, s1. I do not read the judgments in Re: A as purporting to do that. The test is, and must always be, based on a comprehensive analysis of the child’s welfare and a determination of where the welfare balance points in terms of outcome. It is important to note that the welfare provisions in CA 1989, s1 are precisely the same provisions as those applying in public law children cases where a local authority may seek the Court’s authorisation to remove a child from parental care either to place them with another relative or in alternative care arrangements. Where, in private law proceedings, the choice, as here, is between care by one parent and care by another parent against whom there are no significant findings, one might anticipate that the threshold triggering a change of residence would, if anything, be lower than that justifying the permanent removal of a child from a family into foster care. Use of phrases such as “last resort” or “draconian” cannot and should not indicate a different or enhanced welfare test. What is required is for the judge to consider all the circumstances in the case that are relevant to the issue of welfare, consider those elements in the s1 (3) welfare check list which apply on the facts of the case and then, taking all those matters into account, determine which of the various options best meets the child’s welfare needs.”*

The decision in *Re L* was then relied upon in *Re H (Parental Alienation)* [2019] EWHC 2723 (Fam) whereby a transfer of residence was also ordered. The child lived with his mother and again there were continuous proceedings from the point the parties separated. This was again a case whereby the mother had made allegations against the father, mainly in and around domestic violence, which were dismissed by the Court. Direct contact had been occurring without issue but then stopped due to actions by the mother to include showing the child emails which had been received by the father. The Court concluded that the child would continue to suffer emotional and social harm due to the mother’s attitude to contact and the father’s absence from his life. It was found that the only way the child was going to have a relationship with his father was if residence was transferred. It was believed that the father would ensure that contact was facilitated and the child could have a relationship with both parents.

A further approach that the Courts have used in the past is a conditional transfer of residence. In *Re M (Children)* 2012<sup>1</sup> such a conditional order was made against a mother who had not been supporting or facilitating contact. The Court granted the father’s application for residence but suspended it over two years in order to allow the mother a final chance to facilitate regular and sustained contact.

These recent cases show a divergence from the view that transfer of residence should be seen as a last resort and that it is a real and live possibility that parents need to take into consideration when considering their attitude to contact. Again, it comes with its difficulties and such a move could have a harmful and detrimental impact on the child and his/her view of the non-resident parent. These cases show that the Court has to factor this into the balancing exercise being conducted and whether or not measures and therapeutic supports can be put in place which could ease the transition. This is likely a developing area of law and it may be in the coming years Courts show an increasing appetite in giving consideration to such

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<sup>1</sup> [2012] EWHC 1948 (Fam).

applications when faced with severely hostile parents. It currently isn't a common approach and does very much remain a method of 'last resort.'

#### **4. Article 56 investigations and the voice of the child**

A common feature of cases involving implacable hostility and parental alienation is that the Court is likely to direct an investigation into the child's circumstances. This is reflective of the fact that such behaviour can be tantamount to emotional abuse and the child can suffer emotional and social harm. The effects of parental alienation on children is well documented.

Such an investigation is provided for under Article 56 of the Children Order NI (1995) which states

- "(1) Where, in any family proceedings in which a question arises with respect to the welfare of any child, it appears to the court that it may be appropriate for a care or a supervision order to be made with respect to him, the court may direct the appropriate authority to undertake an investigation of the child's circumstances.*
- (2) Where the court gives a direction under this Article the authority concerned shall, when undertaking the investigation, consider whether it should—*
- (a) apply for a care or a supervision order with respect to the child;*
  - (b) provide services or assistance for the child or his family; or*
  - (c) (take any other action with respect to the child.*
- (3) Where an authority undertakes an investigation under this Article, and decides not to apply for a care or a supervision order with respect to the child concerned, the authority shall inform the court of -*
- (a) its reasons for so deciding;*
  - (b) any service or assistance which the authority has provided, or intends to provide, for the child and his family; and*
  - (c) any other action which the authority has taken, or proposes to take, with respect to the child.*
- (4) The information shall be given to the court before the end of the period of eight weeks beginning with the date of the direction, unless the court otherwise directs."*

The reason for directing an investigation in such circumstances is in and around the emotional abuse being sustained by the child. It may be that the Trust may conclude that the child is very well looked after in all other aspects of his life and the concerns being raised don't amount to 'significant harm' to meet the threshold for public law proceedings. These reports also very much depend on the resources of each different Trust in terms of what services and therapeutic interventions they can offer the family. Usually in the most serious of cases the issues arising are complex and will often require further intervention and assessments by other experts.

When such an investigation is directed a Guardian is usually appointed on behalf of the child. This is of the utmost importance in cases of this nature were the child might be suffering a more subtle form of emotional abuse. The issue with this again falls to resources and the significant burden already on NIGALA. More recently the Agency have had difficulty allocating Guardians in Article 56 investigations which is detrimental to the purpose of the investigation and deprives the Court of what was a very helpful insight into what is happening in the child's life and what steps can be conducted to overcome the various issues, which will minimise the harm being caused to the child.

It is a very unusual course of action for the child to be provided separate representation in such cases and it would be more common for the Official Solicitor to be appointed on behalf of the child.

If such an investigation and assessment is directed by the Court, it is important that such is robust and thorough, otherwise it will simply add to further delay and a deterioration in the child's circumstances.

## **5. Psychological assessments and other therapeutic interventions**

There are a number of reasons why a parent becomes implacably hostile and why parental alienation occurs. Such can be attributed to a wide variety of issues such as attitude and personality, the need for revenge, the want to control, the inability to let go, over protectiveness, past experiences with parenting, distrust, etc... The list is endless. There may also be underlying psychological reasons which may attribute to the situation. The Court has the power to direct expert assessments to explore the reasons behind the parent's or the child's entrenched position. The thought process behind this is to assist the Court in understanding why the parties have adopted their positions and what has happened to cause this. An expert can also provide recommendations or assistance to help address and rectify the problem. They may also make a conclusion as to whether or not the resident parent is best placed to meet the emotional needs of the child.

It is important to ensure that the right type of expert is directed in each particular case. Psychologists have been widely used given the background of parental alienation syndrome. There are also an increasing number of parental alienation experts given that it is such an expanding area of law. Systemic family therapists are also being widely used as they can conduct work with both parents and indeed the children with a view of bringing the family together. They will try to draw up a proactive plan as to how to address the identified issues.

Assessments have their drawbacks and limitations too, as the benefit of same will depend on the willingness of the parties to fully and properly engage. If one party is still focussed on past issues and matters which have already been dealt with or dismissed by the Court, such as previous allegations, the assessment may also be of limited benefit and will only be able to go so far.

Understandably the Court relies heavily on such assessments when it comes to conducting the balancing exercise as to what is in the best interests of the child. It may be that consideration needs to be given to directing expert assessments sooner rather than later in proceedings in order to prevent delay and to assist with narrowing the issues.

### **What is the solution?**

This is an area of law which the Family Court system has struggled with for some time. As with all areas of family law there is no one size fits all approach. Each case is dependent on its own facts. These types of cases give rise to extreme levels of hostility and cause a great deal of frustration for all involved. If not managed appropriately they can have devastating implications and long-lasting consequences for families; parents and children.

On occasion the Court has had to admit defeat; where all options have been exercised to no avail. For example, in *Re S (Transfer of Residence)* [2011<sup>2</sup>] the Court had to 'give up' in the child's best interests. The transfer of residence was directed but wasn't successful and

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<sup>2</sup> [2011] 1 FLR 1789.

caused the child further upset and distress. The Court had exercised all options. The father was left with no alternative but to withdraw his application.

The Court isn't the 'superhero' which some parents desperately want it to be in these situations. The Judge can't simply wave a magic wand and get everything working in the manner in which the Contact Order suggests. The Family Court has to take into consideration a number of factors and conduct a very intricate balancing exercise entirely focused on what is in the child's best interests. There are a number of competing factors and there is no checklist box of what to do in these scenarios.

That being said there is room for growth and to review the current practices. The key theme from all recent judgments and articles dealing with these sorts of issues suggest that early intervention is of the utmost importance. This places the burden on legal practitioners to identify the hallmarks and indicators at an early opportunity and to flag these to the Court. Assessments or Article 56 investigations should be applied for as soon as possible, which is difficult because it often takes time for these issues and indicators to present themselves. Fact finding hearings should also occur as soon as is practicable in order to narrow the issues. Courts are driven by the desire to make things work for the children, in the least acrimonious way, which will naturally allow a number of attempts at contact to be made and chances to be provided.

COVID-19 is no doubt going to have had a significant effect on cases involving implacably hostile parents. They will have been given the prime excuse and opportunity to have not facilitated contact arrangements or indeed to have interfered with previous arrangements. The guidance from the Lord Chief Justice and the Government guidance was very clear that contact arrangements should not be affected by the restrictions. None the less the Courts are going to be dealing with the fallout from lockdown and broken down contact arrangements for some time to come. The discussion around hostility and alienation is going to be more prominent than ever. This discussion should include all parties who are involved in dealing with such cases; the judiciary, family law practitioners, social workers, guardians, court children's officers and experts with the relevant background. This will hopefully assist with developing the conversation about how these cases should be managed and the enforcement measures available to the Court and when they should be utilised.

## CAPACITY AND NON-MOLESTATION ORDERS

Leona Gillen, Barrister at Law

### Non-Molestation Orders; relevant law and definitions

Applications for Non-Molestation Orders ('NMO') are made on a daily basis in Domestic Proceedings Courts and they form an important and commonly requested part of the Court's powers to protect victims of harassment; intimidation; and/or physical violence.

The power to grant a NMO is found in Article 20 of the Family Homes and Domestic Violence (Northern Ireland) Order 1998 ('the 1998 Order'). It provides as follows:

- i) that an Order will contain a provision prohibiting the respondent from molesting another person and/ or a provision prohibiting the respondent from molesting a relevant child (Article 20(1)(a) and (b));
- ii) the application must be brought by an associated person (Article 20(2));
- iii) the Court will have regard to all the circumstances, including the need to secure the health, safety and well-being of the applicant and any relevant child before exercising its powers (Article 20(5)); and
- iv) the Order may include an exclusion zone (Article 20(6A)).

'Molest' is defined in Article 1 of the 1998 Order as including inciting; procuring or assisting any person to molest. 'Associated person' is defined in Article 3(3) to 3(6), which includes non-exhaustively those who are married and civil partners (or those who were formerly so); cohabitantes or former cohabitantes; parents or those with parental responsibility for a child or children; relatives.

The definition of molestation has been further developed in case-law, from which the following principles can be distilled:

- i) it includes acts and threats of violence (*Davis v Johnson* [1979] AC 264 at [341]);
- ii) it applies to any conduct which can be properly regarded to call for the intervention of the Court (*Horner v Horner* [1982] Fam 90);
- iii) it does not involve an invasion of privacy per se (*C v C* [1988] Fam 70);
- iv) however, some invasions of privacy will qualify, as seen in the case of *Johnson v Walton* [1990] FCR 568, sending photographs to a newspaper with the intent to cause distress was held to constitute molestation.

Orders are often applied for first on an ex parte basis, and the threshold for an ex parte order is set out in Article 23 of the 1998 Order:

### ***Ex parte orders***

23.— (1) *The court may, in any case where it considers that it is just and convenient to do so, make an occupation order or a non-molestation order even though the respondent has not been given such notice of the proceedings as would otherwise be required by rules of court.*

(2) *In determining whether to exercise its powers under paragraph (1), the court shall have regard to all the circumstances including;*

(a) *any risk of significant harm 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.*

The decision on granting a NMO is a delicate balancing act between the need to protect the applicant and rights of the respondent. An Order is serious in nature and effect, as it prohibits the Respondent from contacting the applicant in any way; carries a power of arrest on breach; and can include an exclusion zone placing restrictions on the respondent's liberty.

That balancing act is even more acute when an Order is granted on an ex parte basis without the respondent having the opportunity to defend themselves or make representations. That is why the qualifications in Article 23(2) are important. The Applicant has to satisfy the District Judge that either;

- i) there is an immediate risk to them or a relevant child if the Order is not made;
- ii) they would be deterred from making the Order if the respondent were put on notice; or they believe that the respondent is aware and is evading service.

### **Capacity**

A lawyer may represent a respondent who by reason of disability and/ or mental health difficulties, does not understand the proceedings or the effect of the Order made against them.

Section 3 of the Mental Capacity Act (Northern Ireland) 2016 ('the 2016 Act') defines what is meant by '*lacks capacity*':

**3.—(1)** *For the purposes of this Act, a person who is 16 or over lacks capacity in relation to a matter if, at the material time, the person is unable to make a decision for himself or herself about the matter (within the meaning given by section 4) because of an impairment of, or a disturbance in the functioning of, the mind or brain.*

- (2) *It does not matter—*
  - (a) *whether the impairment or disturbance is permanent or temporary;*
  - (b) *what the cause of the impairment or disturbance is.*
- (3) *In particular, it does not matter whether the impairment or disturbance is caused by a disorder or disability or otherwise than by a disorder or disability.*

Section 4 of the 2016 Act defines ‘unable to make a decision’:

**4.—** (1) *For the purposes of this Part a person is “unable to make a decision” for himself or herself about a matter if the person—*

- (a) ***is not able to understand the information relevant to the decision;***
- (b) ***is not able to retain that information for the time required to make the decision;***
- (c) ***is not able to appreciate the relevance of that information and to use and weigh that information as part of the process of making the decision; or***
- (d) ***is not able to communicate his or her decision (whether by talking, using sign language or any other means);***  
***and references to enabling or helping a person to make a decision about a matter are to be read accordingly.***
- (2) *In subsection (1) “the information relevant to the decision” includes information about the reasonably foreseeable consequences of—*
  - (a) *deciding one way or another; or*
  - (b) *failing to make the decision.*
- (3) *For the purposes of subsection (1)(a) the person is not to be regarded as “not able to understand the information relevant to the decision” if the person is able to understand an appropriate explanation of the information.*
- (4) *An appropriate explanation means an explanation of the information given to the person in a way appropriate to the person’s circumstances (using simple language, visual aids or any other means). (emphasis added)*

If there are concerns about a respondent’s capacity, a report from a Consultant Psychiatrist should be obtained.

In the context of proceedings in which a Court is being asked to grant an injunction against a respondent, the recent case of *Redcar and Cleveland Borough Council v PR and Others* [2020] 1 FLR 827 provides assistance as to the legal test that should be applied. The most relevant part of the decision for present purposes is by Mr. Justice Cobb at [46]:

*Insofar as lessons may be learned from the difficulties which arose in this case, it may usefully be suggested that before a local authority makes an application under the court’s inherent jurisdiction which is designed to regulate the conduct of the subject by way of injunction, particularly where mental illness or vulnerability is an issue, it should be able to demonstrate (and support with evidence) that it has appropriately considered:*

- (i) ***whether X is likely to understand the purpose of the injunction;***
- (ii) ***will receive knowledge of the injunction; and***

**(iii) will appreciate the effect of breach of that injunction.**

***If the answer to any of these questions is in the negative, the injunction is likely to be ineffectual, and should not be applied for or granted as no consequences can truly flow from the breach.*** (emphasis added)

This follows the long-established principles first expounded by Lady Justice Butler-Sloss in *Wookey v Wookey* [1991] 2 FLR 319:

- i) *'an injunction is a discretionary remedy derived from the equitable jurisdiction which acts in personam and only against those who are amenable to its jurisdiction...an injunction should not, therefore be granted to impose an obligation to do something impossible or cannot be enforced'* (at [323]);
- ii) in cases involving mental incapacity, the question is whether the respondent understand the proceedings and the nature and requirements of the Order sought (at [324]);
- iii) *'...an injunction ought not to be granted against a person found to be in that condition, since he would not be capable of complying with it'* (at [325]);
- iv) The rationale for this is that the Order could not have the desired effect; nor *'operate on his mind so as to regulate his conduct.'* (at [325]);
- v) If there are concerns about capacity, a Judge must ask certain questions and consider particular steps to satisfy themselves that the respondent does have capacity. If it clear that the respondent is mentally ill, then their ability to understand becomes the crucial question (at [325]);
- vi) The Judge must consider, if the respondent is likely to be incapable of *'understanding the purpose of the order, as to whether it is proper to make any order at all before he had a guardian to act for him.'* (at [326]);

In *Wookey*, Lady Justice Butler-Sloss held as follows at [326]:

*I have great sympathy with the approach of the judge, faced with a violent husband and a frail and agitated wife seeking the protection of the court. But having had the advantage of considerable argument as to the powers available under the Mental Health Act 1983, arguments not available to the judge, I have come to the conclusion that he ought not to have continued the injunction, but ought to have adjourned the matter for the attendance of the Official Solicitor or, alternatively, in the light of the congestion of the county court lists, adjourned the matter generally with liberty to either side to apply. The justifiable fears of the wife that the husband might leave hospital and return home could, as I have already indicated, be, and indeed were, met by the operation of s. 18 of the Mental Health Act 1983.*

*Wookey* has been followed by the Courts and remains good law.

In *Harris v Harris* (1999) 23 April (unreported), Lady Justice Butler-Sloss found that a respondent with borderline mental incapacity was capable of understanding the consequences of an Order, notwithstanding his mental illness, and made an Order. The important question is whether the respondent *'understood sufficient to make the order appropriate.'* (emphasis added) (at [11]).

Mr. Justice Geddes in *Banks v Banks* [1999] 1 FLR 726 declined to make an NMO against a wife who suffered from a manic-depressive disorder and dementia, which meant that her abusive behaviour was not something she could control, rendering any Order ineffective.

Lord Justice Sedley in *P v P (contempt of court: mental capacity)* [1999] 2 FLR 897 described the finely tuned balancing exercise at [904]:

*The court has an invidious choice to make in a situation like this between the compulsive behaviour of a most unfortunate individual and the safety and well-being of his family. A court order backed by the threat of imprisonment is a pretty blunt instrument.*

In *P v P*, Lord Justice Sedley provided further guidance on what is required to demonstrate a respondent's understanding (at [904]):

*What it is necessary that a potential contemnor should understand is that an order has been made forbidding him to do certain things and that if he does them he may well be punished.*

This stops short of requiring a respondent to understand the meaning or significance of courts or legal processes.

### **Does this leave a victim without protection?**

If a respondent lacks capacity and therefore cannot understand an Order, a lawyer representing an applicant may very understandably question whether this represents a lacuna depriving their client of the Court's protection. An applicant's representative may find some comfort in an application for an injunction under Article 3 of the .. Article 3 provides:

**3.— (1) A person shall not pursue a course of conduct—**

*(a) which amounts to harassment of another; and*

*(b) which he knows or ought to know amounts to harassment of the other.*

Article 3(b) provides that there is a dual *mens rea* consisting of either actual or constructive knowledge, which circumvents difficulties with restraining those with mental health problems and/ or personality disorders. Protection under the Protection from Harassment Act 1997 can be provided in situations involving domestic violence (*Lomas v Parle* [2003] EWCA Civ 1804).

### **Conclusion**

The principle in *Wookey* as followed and expanded on in subsequent case-law (a non-exhaustive list outlined above) requires a Judge before granting an NMO to satisfy themselves that a respondent will understand an Order has been made against them prohibiting them from doing certain acts and that they will be punished if they are found to be in breach. The answer to these questions will be fact-specific and each case will depend on the individual circumstances of that particular respondent.

**THE MOVING PARTY:  
KEY CONSIDERATIONS FOR PRACTITIONERS IN NI AND UK RELOCATION CASES**

**Jenny Cunningham, Barrister at Law**

Cases involving relocation of children are undoubtedly some of the most emotive cases that practitioners will encounter given that the relocation will inevitably have a profound and life-long impact on subject children's relationships with the 'remaining' family members. The decision to relocate a child is invariably approached by the 'moving' party in the understanding that such a move is in the child's best interests. Unavoidably, however, this is often a source of bitter dispute when the move is not agreed, and where the 'non-moving' party can feel that the subject child is being taken from them.

Owing to the comparatively small size of Northern Ireland there are simply fewer relocation cases relating to moves within the jurisdiction. That is not to minimise the massive impact that would be had on a child of relocating, hypothetically, from around the corner from their father in Kilkeel, to a new home with their mother in Limavady. The travel time involved often precludes the after-school or impromptu contact that may previously have been enjoyed between the child and the 'non-moving' parent. Whilst this can often be addressed with larger 'chunks' of contact time, this can leave the 'non-moving' parent feeling less involved than they once were in the day-to-day life of the child.

Given the financial uncertainty and pressures brought about during this year's Pandemic there may well be a corresponding increase in parents seeking to relocate to secure employment. This article is intended as a non-exhaustive guide for practitioners in how to approach private relocation cases within Northern Ireland and elsewhere in the UK.

Procedurally, relocation cases are likely to begin before the Family Proceedings Court by way of an Article 8<sup>1</sup> application from the 'moving' party for a Specific Issue Order permitting the proposed relocation with the child. Alternatively, cases can commence by way of a Prohibited Steps Order application from the 'remaining' party who has become aware of the relocation being planned or attempted without consent or court oversight. The latter will undoubtedly be an emotionally taxing situation for the parties and a high degree of client care will be often be required.

The approach of the Courts to relocation cases was for years guided by the authority in the 2001 English Court of Appeal case of *Payne v Payne*<sup>2</sup> which summarised at paragraph 85:

- a. *The welfare of the child is always paramount.*
- b. *There is no presumption created by section 13(1)(b) in favour of the applicant parent.*
- c. *The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight.*

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<sup>1</sup> Article 8 of the Children (Northern Ireland) Order 1995.

<sup>2</sup> *Payne v Payne* [2001] EWCA Civ 166

- d. *Consequently, the proposals have to be scrutinised with care and the court needs to be satisfied that there is a genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end.*
- e. *The effect upon the applicant parent and the new family of the child of a refusal of leave is very important.*
- f. *The effect upon the child of the denial of contact with the other parent and in some cases his family is very important.*
- g. *The opportunity for continuing contact between the child and the parent left behind may be very significant.*

Whilst the above factors provided and indeed remain a useful framework for consideration of cases, there was concern following *Payne* that a presumption had been created in favour of the relocating parent, but this has since been dispelled<sup>3</sup>. The more recent decision of *MK v CK*<sup>4</sup> emphasises that the key guiding principle was the welfare of the child. The 'Paramountcy Principle'<sup>5</sup> – that the welfare of the child is the prevailing consideration – was confirmed to be the position of the Courts in this jurisdiction in 2013 by the judgments of the Court of Appeal in *SH v RD*<sup>6</sup> and *Re L (Relocation application)*<sup>7</sup>. Practitioners should therefore approach the individual circumstances of the subject children on a case-by-case basis, having regard to the 'Welfare Checklist'<sup>8</sup> which is summarised below with corresponding suggestions for practitioners in relation to addressing each factor on behalf of their client:

**(a) The ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding):**

In the vast majority of relocation cases there will be a painful divergence of opinion between the parties in respect of what the subject children want, often due to the subject children wishing to please both parents by telling them what they want to hear. Practitioners should be ever mindful of ensuring that the voice of the child is not lost in the course of proceedings. Clients are often well served by being reminded of the importance of shielding the children from the issues between the adults, and of the inappropriateness of discussing with them the details of any court proceedings.

Cases are often benefitted greatly by the timely involvement of the Court Children's Officer who can provide an independent account of the children's wishes and feelings, as well as recommendations to the Court on the likely impact of the proposed relocation. The Court Children's Service is equalled in its value only by the high demands currently placed upon it, therefore timely referrals are key. In sufficiently complex or time-sensitive cases an application for transfer to the Family Care Centre may need to be considered to allow for the involvement of the Official Solicitor on behalf of the children.

**(b) The physical, emotional and educational needs of the child:**

The 'moving party' would be assisted by advice recommending a timely and detailed collection of relevant information in respect of proposed schooling, GP, dentist, living arrangements,

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<sup>3</sup> See Keegan J's helpful judgement in *WA v KA* [2019] NIFam 2, citing; *NK v CK* [2012] Fam 137.

<sup>4</sup> *MK v CK* [2011] EWCA Civ 793.

<sup>5</sup> Article 3(1) The Children (Northern Ireland) Order 1995

<sup>6</sup> *SH v RD* [2013] NICA 44

<sup>7</sup> *Re L (Relocation application)* [2013] NICA 45

<sup>8</sup> Article 3(3) the Children (Northern Ireland) Order 1995

nearby friends and relatives etc. for the children at their proposed new location. Again, discussion of these proposed arrangements in mediation can serve to 'short-circuit' issues and provide a valuable recognition of the other parent's role and involvement in deciding same.

However, if litigation becomes inevitable a sufficient level of research and preparation into any proposed move should be demonstrated to the Court. Equally a well-considered response with similarly detailed evidence should be prepared on the part of the 'remaining' parent. In cases where children have particular medical or educational needs, consideration may need to be given at an early stage to an expert report to address likely areas of particular concern for the Court (from an independent social worker, a paediatric occupational therapist, an educational psychologist etc. as the case requires). Relevant exhibits may include but are not limited to; clear maps of relevant areas, school prospectuses, details of transport links to and from school, and importantly, transport links to and from the 'remaining' parent.

**(c) The likely effect on the child of any change in their circumstances:**

As discussed at (a) above this consideration is often explored with the assistance of the Court Children's Service, and/or the input other relevant professionals. However, in cases where the children are considered too young (generally below five years of age) to be spoken to directly, and in the absence of independent verification of the children's wishes and feelings, much will depend on the evidence and credibility of the parties. Mindful of the emotive nature of relocation proceedings especially, clients should be cautioned that poor behaviour on their part could negatively impact their case. (Often but not limited to; attempting to influence the subject child, sending abusive messages to the other party, overholding the subject child.)

The Court will have to conduct a consideration of the likely circumstances of the child should the relocation be permitted or refused. Financial evidence such as parties' earnings and outgoings, valuations of relevant properties, and details of any related matrimonial proceedings or settlements will be relevant. However, practitioners should be clear with parties from the outset of proceedings that the Court's consideration of the relocation issue is not to be treated as an opportunity to air or rehash any grievances from the parties' separation.

**(d) The age, sex, background and any characteristics of the child which the court considers relevant:**

Alongside the other factors discussed, seemingly small details, such as the child being a keen surfer versus a proposed relocation to landlocked Northampton, while not determinative on their own, can be important factors for the court's consideration. The child's level of integration into either area, any previous difficulties with schooling or socialising, and their particular hobbies can assist the court in forming a picture of what would be in the particular child's best interests. Broader issues such as cultural or religious differences between the parties, and their relative perspectives on how the subject child should be raised or exposed to same can be more challenging issues to address and should be flagged at the earliest stage to allow instruction of any necessary expert(s).

**(e) Any harm which the child has suffered or is at risk of suffering:**

In the absence of public law proceedings, parties and indeed practitioners would be forgiven for assuming this factor may not play a prominent role in their particular case. However, in acrimonious cases parties are often shocked to learn that the subject children have already suffered emotional harm due to the ongoing tension between their parents. Parties should be cautioned from the outset that should the court deem the children at risk of ongoing emotional

harm due to parental acrimony, an Article 56 investigation<sup>9</sup> could be directed which may lead to public law proceedings being issued in respect of the children. Again, mediation is a valuable tool to focus minds and assist in shielding subject children from parental acrimony and adult issues.

Similarly, parties should be mindful from the outset of the real risk of emotional harm in separating the children from the 'remaining parent' as this will be a key consideration for the court in most if not all relocation cases. Facilitation of effective contact post-relocation is not only in the children's best interests, but detailed proposals for same from the 'moving party' can be seen to demonstrate insight and support regarding the role of the other parent in the lives of the children.

**(f) How capable is the child of meeting the needs of each of their parents and any other person in relation to whom the court considers the question to be relevant:**

It is often, but not always, the case that one party will have played a more 'hands-on' role in respect of the subject children and may be referred to as the 'primary carer' of the children. Exploration of this factor will often require evidence recounting the respective roles that each party has played in the children's day-to-day lives. Instructions should be taken from the outset regarding parties' involvement in the children's basic routine, the associated housework, homework and extra-curricular activities. Firm and clear instructions on what level of care of the children clients can feasibly manage in conjunction with their other commitments (caring for other relatives, employment) will be required.

Parties can understandably be sensitive to the use of certain phrases and language with respect to their parenting role. Care should be taken to assure clients that if one party could fairly be described as the 'primary carer' without any factual dispute of same, this is not in any way a nullification of the role of the other party.

**(g) The range of powers available to the Court under this Order in the proceedings in question**

As outlined above, parties should be aware that the Court has the power to direct an Article 56 investigation if deemed necessary, and indeed to make any Article 8 Order which the court deems appropriate in the circumstances of the case<sup>10</sup>.

It is hard to envisage an area of practice where the effects of the imperfect solutions which the courts can offer are more keenly felt than in respect of relocation cases. Practitioners therefore need to be mindful from the earliest stage of minimising acrimony wheresoever possible. Early and earnest consideration of mediation, and of ascertaining, where practicable, the wishes and feelings of the subject children is key, especially when cases are time-sensitive in nature, for example the moving party seeking to take up a new job or property in the new area. The importance of the role that mediation can play in safeguarding the children from the effects of parental acrimony cannot be understated and should be explored with clients at the earliest stage.

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<sup>9</sup> Article 56 of the Children (Northern Ireland) Order 1995.

<sup>10</sup> Article 10(1)(b) the Children (Northern Ireland) Order 1995.

## A PRACTICAL GUIDE FOR SOLICITORS AND CLIENTS PARTICIPATING IN SIGHTLINK OR OTHER REMOTE HEARINGS AND REVIEWS

**Ann McMahon, LLB, Head of Practice and Procedure, LSNI**

1. In advance of the scheduled hearing it will be important to speak to representatives of all other parties involved in the proceedings to clarify, define and narrow issues in the case. This is an invaluable exercise and will result in the scheduled hearing time being used to maximum benefit for all.
2. Parties should liaise in advance of any court listings to identify whether their case can proceed by way of remote hearing/review or in person hearing or a mixture of both and lodge the appropriate court forms as soon as possible. All current forms are accessible on the judiciary.ni web page (<https://judiciaryni.uk/coronavirus-covid-19>).
3. If the Judge scheduled to hear the case indicates that your client/witness must attend at your office to give their evidence, and you consider that arrangement is not possible in the current pandemic, then you should so inform the Judge as soon as possible and set out what arrangements will be employed so that the hearing can proceed.
4. Consider setting up a WhatsApp group or Zoom meeting to run in tandem with the remote hearing/review so that real time instructions can be taken and communications exchanged with your legal team and client. However, be very aware of the possibility of being overheard on Sightlink – take appropriate precautions .
5. Plan to log on 10 mins in advance.
6. Sightlink login details may be accessed on the Society's web site, Members' Section via this link - <https://www.lawsoc-ni.org/directory-of-sightlink-addresses> ; or alternatively on the NICTS web site - <https://onlineservices.courtsni.gov.uk/publiccourtlis/> . Ensure in advance that you and your client have the correct SightLink number for the court.
7. It is inevitable that conducting business remotely will result in teething troubles for participants and hosts/organisers. Do therefore be sympathetic to the technological and other difficulties experienced by others.
8. For those participating in their first remote hearing/review it is advisable to read the Guidance beforehand. JudiciaryNI Guidance on Remote Hearings can be viewed in this link: - [https://judiciaryni.uk/sites/judiciary/files/decisions/Practice%20Direction%2001.20%20-%20Remote%20Hearings\\_0.pdf](https://judiciaryni.uk/sites/judiciary/files/decisions/Practice%20Direction%2001.20%20-%20Remote%20Hearings_0.pdf) Also consider speaking to colleagues who have participated in remote hearings/reviews previously.
9. Ensure that all devices are fully charged and that you have a charging cable and plug to hand, as virtual hearings/meeting will exhaust battery life on any device.
10. In advance, check that the audio and video/camera facility on the device you choose to use is switched on and functioning.
11. If feasible, have a second device on standby in case you experience issues with your main device.
12. Solicitors might consider exchanging mobile numbers/email addresses with each other to have an additional strand of connectivity during the hearing. It will be important to communicate with colleagues during a remote hearing/review – *away from* Sightlink.

13. Ensure in advance that all papers, bundles, statements etc have been agreed and lodged with the Court Office and copies shared with the other parties involved. Electronic bundles should be indexed and paginated. They should contain only documents and authorities essential for the hearing/review as large files can be slow to transmit and unwieldy to use and navigate.
14. Consider if witnesses will require access to reports, photographs, statements etc and ensure that appropriate arrangements are in place so that they can view a virtual copy if necessary.
15. It is important that clients and witnesses are contacted in advance to ascertain if they are content to affirm before giving evidence. If that is not their preference, ensure that they are aware that they will have to have a copy of their preferred religious book to hand to swear upon.
16. Consider if it would be of benefit to lodge a booklet of agreed correspondences with the Court Office and other representative(s) and if so, paginate and share in ample time before the hearing/review date.
17. Remote hearings/reviews will proceed as a court of law. It is imperative that solicitors conduct themselves accordingly in terms of behaviour, courtesy and dress code from the outset of the session. *Solicitors are reminded to limit conversations between colleagues on Sightlink in the absence of the Judge sitting as it is an open link and only closed at the direction of the Judge.*
18. Similarly, it will be incumbent on solicitors to prepare their clients and witnesses in advance and remind them of the etiquette of appearing in court, whether they are participating from the solicitor's office or at an alternative location. Any party attending a court hearing by video conference or teleconference call is expected to maintain equivalent standards of behaviour as if they were attending the Court physically.
19. It is a contempt of court to make any recording of a hearing, whether of the audio or, for example, by taking a screenshot during a video hearing, without the court's permission. Ensure clients and witnesses are aware.
20. Make use of the 'mute button' when not addressing the court and remind your client and witnesses to do likewise.
21. For remote hearings/reviews to operate effectively it is of utmost importance that all participants strictly adhere to the commencement and ending times allocated to their case.
22. When the hearing/review ends you must log out and remind your clients and witnesses to do likewise.
23. Ensure that you have arrangements in place to consult with your client and/or counsel after the hearing/review by phone or a virtual platform, as you would after a face to face hearing.
24. Solicitors may find it useful to view this presentation by Gareth Herron, Head of Digital Services and Pamela Reid Head of Digital Modernisation in NICTS 'Practical Tips and the use of SightLink and Webex for hybrid and remote hearings' which is downloadable from this link - <https://register.gotowebinar.com/recording/4153083426197183501>

## CASE REPORT

### Ashton McKernan, Brentnall Legal

The issue surrounding the extension of Non-Molestation Orders has been clarified by the High Court in the judicial review case of JR118's Application in a case brought by Brentnall Legal Limited.

#### Background

We were instructed by AS to bring Non-Molestation Order proceedings against her ex-partner, P. The allegations made by AS against P were of sexual violence and prolonged coercive conduct. P had been arrested for the rape of AS and released on police bail pending further investigation. An ex-parte Non-Molestation Order was granted by District Judge Bagnall on 30th April 2020 and given a return date of 27th May 2020. It was confirmed with the PSNI that P had been served with the Order, however there had been no contact by P or by any legal representative on his behalf by 26th May 2020 and so the relevant Covid FCI1 form was lodged with the Court advising the same and seeking a four week adjournment with the Order extended on a without prejudice basis to allow P to seek legal advice and/or present to defend the application. An email was then sent from the court office advising that whilst P had been served with the Order, he had not been served with the summons. The email further advised that District Judge Meehan had advised that AS could make a further application if there were any further incidents. We were then advised that this was due to the legislation not providing for extensions. Three steps were then taken; an appeal to the Family Care Centre was lodged, an application was made to the District Judge to state a case to the Court of Appeal and judicial review proceedings were initiated. Given the urgency in the matter, O'Hara J agreed that judicial review was the preferred option.

The agreed question for the Court was whether Article 24 of the Family Homes and Domestic Violence (NI) Order 1998 allowed for a Non-Molestation Order to be varied by extending the date to which it has effect.

#### Submissions

It was agreed between the parties that there was no material difference between the law in Northern Ireland and the law in England and Wales. It was submitted on behalf of AS that the Practice Guidance of Sir James Munby issued on 18th January 2017 specifically provided for circumstances in which an ex parte Non-Molestation Order could be varied by extending the duration of the Order.

Mr Lavery QC on behalf of AS submitted that the purpose of a Non-Molestation Order was to protect vulnerable people and therefore there is no justification for restricting the meaning of the word varied in Article 24(1). In fact, it would make no logical sense to allow every other part of an Order to be varied but the date, especially when read in conjunction with Rule 13 of the Magistrates Court (Domestic Proceedings) Rules (NI) 1996 and the relevant form F8 to 'extend vary or discharge'. Further, it was submitted that given the various and wide-ranging reasons for the adjournment of cases, the court must be regarded as having the power to extend the ex parte Order.

It was submitted by Ms McMahon on behalf of the Respondent that the legislation makes a clear distinction between Occupation Orders and Non-Molestation Orders. It was highlighted

that the legislation has provisions for the length of time Occupation Orders can be made and extended for and that the power to extend Occupation Orders is not derived from Article 24 but instead by specific provisions within the legislation. It was further submitted that support for this stance was derived from the earlier Domestic Proceedings (NI) Order 1980 which would indicate that a new interim order would be made rather than an existing Order be extended.

Ms Rice for notice party, P, submitted that the approach taken by the District Judge on 27th May 2020 was the correct one.

## **Judgment**

O'Hara, J disagreed with the District Judge and held that he could see no logic or basis for confining the word varied in Article 24 to exclude the variation of the date to which the Order has effect. He further drew a distinction between Occupation Orders and Non-Molestation Orders stating that the duration of an Occupation Order is curtailed by the legislation due to the fact that such an Order interferes with one's property rights whereas there is no right to molest someone.

O'Hara, J further agreed that the District Judge's interpretation did not fit with the wording of Rule 13 or Form F8 of the guidance issued in England and Wales which confirmed his view that the District Judge's interpretation was incorrect.

It was held that on the papers before the District Judge on 27th May 2020 that AS was a woman who needed protection and the law should be interpreted to allow consideration of what needed to be done to protect her.

O'Hara, J gave the following guidance in relation to the extension of ex parte Non-Molestation Orders: -

- If an extension of an ex parte Non-Molestation Order is sought, then the Article 23 risk of significant harm may apply. However, if the respondent has been served that may not be the case.
- If an extension of an inter partes Non-Molestation Order is sought, then the relevant test will be that under Article 20(5).
- In either of the above the court should consider whether the Order should be extended and for long. In doing so, the court will ask itself two questions: -
  1. What has happened in the period since the Non-Molestation Order was made; and
  2. What the overall context of the application is.

It was stated that in the present case, the allegations of a prolonged period of coercive conduct might in itself be enough to persuade the court to extend the Order. This approach would allow the respondent to present his answer to the allegations while ensuring the protection of the applicant.

O'Hara J declared that Article 24 of the Family Homes and Domestic Violence (NI) Order 1998 empowers a court to vary a Non-Molestation Order by extending the date to which it has effect.

Full judgment available at [\*In the matter of an application by JR118 for judicial review \[2020\] NIQB 54\*](#) .

## **CASE NOTES**

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

#### **IN THE MATTER OF ORLA AND MARTIN (2)**

**(SHARED PARENTING BREAKDOWN), per O'Hara J, delivered 10th January 2020**

#### **FACTS/BACKGROUND**

Previous judgements had been made in this case which had a long running history of acrimony between the parents which the children had not been protected from. These have been summarised in previous editions of the Child and Family Law Update. A joint residence order with respect to both children had been revoked by the court in July 2018 and an application by the Trust to withdraw applications for care orders had been refused in an attempt to restore contact between the children and their father. No contact had however taken place for some time.

Orla was 16 ½ and Martin 13 ½ at the time of hearing.

The matter came before the court to consider whether final orders should be made.

Leave for the Trust to withdraw proceedings for a care order had been made with respect to Orla in December 2019 – given her age and the very lengthy period that contact had not taken place. The court also made a specific issue order which required the mother to tell the father of any significant illness or mishap that Orla might suffer and also required the mother to tell Orla of any similar such illness/condition which the father might suffer.

In addition to Martin not having seen his father for a lengthy period of time, his school attendance record was “terrible.” The Trust were proposing that the judge should direct a referral to the Education Welfare Service but the father was proposing that Martin’s should reside with him either under the auspices of a care order or a residence order. The father was also seeking that Martin be referred for therapeutic work.

The Guardian’s position was that Martin was suffering but that he wanted to be left alone and that the ongoing proceedings were just causing him more damage. Final orders were required in the Guardian’s view. The Trust were taking a similar position.

#### **HELD**

The Court granted leave to the Trust to withdraw their application for a care order with respect to Martin and also made a specific issue in the same terms as the one made with respect to Orla. The court also directed that the Education Authority should make a referral to the Education Welfare Service for urgent investigation as to Martin’s attendance at school. The judge also directed that his previous judgements could be released to Martin’s school principal and also to the children’s General Practitioner and any consultant that they might see in the future.

#### **REASONING**

The court considered all the circumstances of the case but particularly the trauma that Martin had been suffering from. His absence from school was extremely concerning but a transfer of

residence would be even more damaging to his well-being (against wishes he had previously expressed to the Guardian ad Litem).

The court accepted that the way forward for Martin was far from perfect but that freedom from court proceedings and ongoing dealings with professionals might free him up to lead a “normal” life and hopefully in due course to re-establish a relationship with his father.

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND  
FAMILY DIVISION  
IN THE MATTER OF THE CHILDREN (NORTHERN IRELAND) ORDER 1995  
BETWEEN MS B, Applicant and MR D, Respondent  
IN THE MATTER OF A CHILD KIM  
(ORDER OR NO ORDER: ARTICLE 3(5), Per Keegan J, delivered 26 June 2020**

**FACTS**

This was an application by a mother for a residence order in relation to a child aged 5 ½ at the time of hearing. The mother also sought an order defining the arrangements for the child’s contact with her father. The court also wished to consider whether an order should be made under Article 179(14) of the Children (Northern Ireland) Order 1995 to prevent Mr D from making further applications without the leave of the court.

The case was, with the agreement of all parties, dealt with by way of submissions via sight-link. The court had the benefit of a social worker’s report dated 1 November 2019.

Both parties in the case had had previous dealings with Social Services in relation to other children. Mr D has two other children, one of whom is the subject of ongoing care proceedings, Mr D had been convicted for child cruelty in relation to a fractured skull and spiral fracture the other child had sustained while in his care. Ms B has a non-molestation order, granted by the High Court, against Mr D. (This was the subject of an appeal although the Court in the present instance considered that was most likely to do with the length of the order made.) Mr D had also been convicted of drugs related offences and possessing criminal property. As recorded in the social work report, Mr D has a history of drug misuse.

In relation to Kim and with advice from Social Services, Mr D had contact with Kim weekly on a Sunday from 1-6pm supervised by his wife. Throughout this contact Mr D had made various allegations about Ms B’s care of Kim, none of which were substantiated by Social Services. In fact, home conditions were found to be of a good standard and Kim was clean and clothed acceptably.

Ms B also had had involvement with Social Services but a pre-birth assessment in relation to Kim had been positive and there were no concerns about Ms B’s ability to parent at that time – she had looked after her daughter, now an adult and her other son.

Contact between Kim and her father was suspended after Mr D’s home was the subject of a drugs raid in August 2018 and had had only one contact supervised by Mr D’s aunt.

During the course of care proceedings with respect to one of Mr D’s children a report had been prepared by Dr Pollock which was a psychological assessment of Mr D. The other parties in that case wished to have sight of this but rather than sharing it, Mr D simply withdrew his application for contact with his other child.

The Social Worker report for the present case described Mr D as acting aggressively towards her. It also refers to the mother's view that Kim had a bond with her father and was a good father however his behaviour impacted negatively on her and the mother had concerns due to not seeing the psychological assessment and his behaviour towards her, in the presence of Kim, which had led to her obtaining the non-molestation order.

The recommendations in the Social work report were for no direct contact due to Mr D's lack of insight and poor decision making but that indirect contact to allow Mr D to send cards, presents and photographs to Kim would be appropriate. Ms B should help Kim to send back cards and photographs in return.

## **HELD**

The Court made a residence order in favour of the mother and an order defining indirect contact arrangements along the lines the social worker had suggested. The Court proposed that the parties discuss a suitable family member who could pass on the cards/presents etc. No Article 179(14) prohibition was made as Mr D's representatives were indicating he had no intention of making applications with respect to Kim in the near future.

## **REASONING**

This was a case decided on the facts and background. Mr D's previous actions, non-cooperation with agreed arrangements and his poor decision making were factors which mitigated against him.

A residence order was required as the mother needed certainty and to be free from fear – Mr D's previous record of changing arrangements to suit himself meant that he needed to know what the limits of his contact were and that the court considered that Kim should be living full time with her mother despite his allegations about her care of the child.

## **IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

### **FAMILY DIVISION**

### **OFFICE OF CARE AND PROTECTION**

### **IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985**

### **BETWEEN ZA, Plaintiff and BY, Defendant**

### **IN THE MATTER OF K (A MINOR)**

### **HAGUE CONVENTION (ARTICLE 13 GRAVE RISK EXCEPTION: PROTECTIVE**

### **MEASURES; JUDICIAL LIAISON), per Keegan J, delivered 10th July 2020**

## **FACTS/BACKGROUND**

The parties married in December 2013 and decided to have a baby, K was aged 5 at the time of hearing of this application. The defendant was the mother of the child (the mother) and accepted that the plaintiff was a co-parent (the co-parent) under Dutch law. The mother was originally from Northern Ireland and had met the co-parent, who was Dutch, while she was working in the Netherlands. The parties had previously separated and the mother had come to Northern Ireland with the child but they had later reconciled and returned to the Netherlands.

The relationship between the parties was one of conflict and domestic violence, exacerbated by the use of cannabis and alcohol. Both parties were involved with this to disputed levels but the co-parent had been convicted of an assault on the mother in 2017 and also admitted having shoved the child off her and told him to "f... off," twice, this latter in January 2020. A

previous incident, in March 2019, had led to neighbours calling the police who referred the family to Social Services.

Following the incident in January 2020, the parties separated and legal proceedings, for divorce. These were ongoing when the mother left the Netherlands with the child for Northern Ireland. Her leaving the Netherlands was without the permission of the co-parent and unlawful in the context of the Hague Convention.

The parties were agreed that several Hague Convention requirements were met, including, that the co-parent had rights of custody of the child, that the child was habitually resident in the Netherlands prior to his removal and retention, that he was under 16 years old, that less than one year had passed since the removal, that the retention was wrongful and that the Netherlands retains jurisdiction.

The matters not agreed by the parties were:

- Whether the mother's allegations were true
- If true, whether the allegations placed the child at grave risk
- If grave risk was found, whether the protective measures in the Netherlands were sufficient to secure the child's protection if a return order was made
- Whether the court should exercise its discretion not to return the child

## **HELD**

Subject to various protective measures being put in place in the Netherlands prior to the child's return, the Court made a return order. These protective measures were arranged with the assistance of the Netherlands liaison judge.

## **REASONING**

The court considered the provisions of the Hague Convention and case law and was satisfied that the matters agreed by the parties were established. This meant that the basic requirements for a return order were present. The mother, however, was arguing that her allegations of domestic violence would put the child at grave risk or place him in an intolerable situation cf. Article 13 of the Hague Convention which states:

*“Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –*

*(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”*

The court considered case law in relation to the definition of grave risk and intolerable situation.

All parties involved in the case agreed that the exception of grave risk requires a high level of proof and that the burden of proof lies with the person objecting to a return order.

The case of *Re E (Children) (2011) EWLR* sets out the test for grave risk:

*“...the burden of proof lies with the person....which opposes the child's return....in evaluating the evidence the court will of course be mindful of the limitations involved in*

*the summary nature of the Hague Convention process.....neither those allegations nor their rebuttal are usually tested in cross-examination.”*

*“..the risk to the child must be grave...Although grave characterises the risk rather than the harm, there is an ordinary language link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as grave while a higher level of risk might be required for other less serious forms of harm.”*

*“...there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also..can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent.”*

The court in the *Re E* case also looked at protective measures and said, “This is where arrangements for international co-operation between liaison judges are so helpful.”

In the present case the judge could not assess the veracity of all of the allegations and cross-allegations made by the parties, however, considered that, given the conviction of the co-parent and her admissions re other incidents involving domestic violence, that the co-parent, “presents with obvious and serious issues which have clearly impacted upon her care of K.”

The court considered that the nature of these issues was sufficient to establish the “grave risk,” and an intolerable situation for the child if he was to return to the co-parent’s care.

The co-parent, however, was not seeking to alter the arrangement whereby the child would be primarily cared for by the mother and in the past the co-parent had not breached orders or failed to abide by arrangements.

Ultimately this case was decided on the protective measures which would be available to guard against the grave risk and/or intolerable situation. One such was that the co-parent should move out of the former matrimonial home and allow the mother to live there with the child. Netherlands Social Services should have an input into the case until the final arrangements were settled by the court there.

The Judge received responses from the Dutch Central authority in relation to the involvement social services could and would have in the case if the child was to return. They also assisted in relation to a travel permit for the child.

The Judge also liaised with the Hague Network judge in the Netherlands in relation to the court proceedings which were ongoing there and which would continue when the mother and child arrived back in the Netherlands. These included a variation of a court order which had given the co-parent sole use of the former matrimonial home after the mother and child’s departure to Northern Ireland.

The court here indicated that all the protective measures must be in place in this case before the child could be returned, undertakings by the co-parent on their own would not be sufficient.

In the event, a comprehensive order was drafted by Counsel taking all these matters into account and the court was satisfied with this and ordered a return of the child to the Netherlands on a date by which all the necessary safeguards would have been put in place.

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

**BETWEEN:**

**AB (Appellant/Respondent) and A HEALTH AND SOCIAL SERVICES TRUST  
(Respondent/Applicant and BD and CF (Respondents))**

**IN THE MATTER OF DAWN AND MEG (MINORS) (APPEAL: PRACTICE AND  
PROCEDURES: OBLIGATIONS POST CARE ORDER), per Keegan J, delivered 16th July  
2020**

**FACTS/BACKGROUND**

This was an appeal against a decision of the Family Care Centre to make a care order with respect to two children. The fathers of the children BD and CF were not putting themselves forward as carers for the children but the mother was. The relationship of the mother with the fathers had been characterised by domestic violence and the mother had various mental health issues of a serious nature – she herself had had a fraught upbringing and later made poor choices of partners who had been violent towards her, on occasion in the presence of the children, Dr Pollock, a Consultant Forensic Psychologist had prepared various reports on the mother’s mental health and ability to prioritise her children.

The mother argued on appeal that the Family Care Centre decision had been wrong in all the circumstances and in particular, that the two fathers were no longer part of the mother’s life, that the Trust had not offered to carry out any work with the mother between April 2018 and July 2019, that the Trust had ruled out rehabilitation of the mother after sight of Dr Pollock’s first report which gave a little hope as to the mother being able to prioritise the children, the making of the care order was premature and disproportionate, fresh evidence was available showing the mother was prepared to engage with mental health services.

Her representatives sought for the Family Care Centre judgement to be set aside and for a re-hearing of the case.

**HELD**

The judge dismissed the mother’s appeal and gave some useful guidance, drawing reference to case law, on the Trust’s obligations post full care orders being made.

**REASONING**

The parties all agreed on the test to be applied in cases of appeal which requires the court to consider whether the trial judge was wrong cf. *Re B (A Child)* (2013) UKSC 33. The case of *McG v McG (2002) NIFam 10* in this jurisdiction gave guidance as to practice and procedure in appeals in the light of Article 6 of the ECHR. In the present instance the case proceeded without oral evidence being given although the appeal court did allow the mother to update the court in relation to her mental health.

The court on appeal drew reference to the court at first instance’s finding of facts including that the mother had allowed Dawn’s father to have access to the home and his child, even though she knew he was a violent person with a criminal history. She also left her children in the care and present of unsuitable people leading to them witnessing domestic violence and a violent incident. Dr Pollock’s reports recommended that the mother stick to a programme of medication for her depression and re-engage with a self-harm intervention clinic to assist her to deal with her psychological difficulties which were chronic and personality based in origin. These reports were unchallenged by any party at first instance. A real issue for the

court on appeal was the mother's evidence at first instance when she made it clear that she did not wish to engage in any work and did not accept that her behaviour vis a vis care of the children was problematic.

In these circumstances the court on appeal considered that the grounds of appeal were not made out.

The court, however, commented that the mother's self referral to mental health services was a positive step. In the present case no step had been taken by the Trust to pursue a freeing order, contact, albeit indirect contact because of Covid issue, was taking place and there was some evidence to indicate that the children were not flourishing in care.

The court went on to give useful guidance to Trusts post care order.

The case of *KA v Finland (2003) 1 FLR 696* confirms that the Trust must continue to act in a ECHR compliant manner post care orders being made. "...The positive duty to take measures to facilitate family reunification ...will begin to weigh on the responsible authorities....subject always to its being balanced against the duty to consider the best interests of the child..." "...a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by those authorities on parental rights of access." "The minimum to be expected of the authorities is to examine the situation anew from time to time to see whether there has been any improvement in the family's situation."

Parents should be kept involved in any decision making carried out following the making of a care order, for example, any change of placement – the case of *P and Q (2002) EWCA Civ 1151*.

Case law also confirms that parents have remedies post care order under ECHR and also under the Children (NI) Order 1995 in relation to contact or discharge of a care order.

Any freeing order proceedings will also require that court of fully consider all issues in relation to the parents in order to satisfy the requirements of the Adoption (Northern Ireland) Order 1987 read in the light of human rights legislation.

The appeal judge commented, "If anything, this case has highlighted the fact that family life is not static."

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND  
FAMILY DIVISION  
OFFICE OF CARE AND PROTECTION  
IN THE MATTER OF KW  
IN THE MATTER OF AN APPLICATION FOR COSTS FOLLOWING WITHDRAWAL OF  
PROCEEDINGS, per Keegan J, delivered 21 July 2020**

**FACTS/BACKGROUND**

The case had concerned an application by a Health and Social Services Trust for declaratory relief under the High Court's inherent jurisdiction for the protection of KW who was a vulnerable adult living in Trust accommodation. She had had a relationship with man (the third defendant in the case, who was in prison but thought by the Trust, about to be released) which was characterised by violence. A further application was later made by the Trust for an injunction against the third defendant. At the start of proceedings KW was represented by

the Official Solicitor but ultimately found to have mental capacity and obtained her own legal representation. Capacity was established in the opinion of Dr English, consultant psychiatrist who prepared three reports for the court, who also found that KW was, “a vulnerable adult whose autonomy could be compromised through contact with the third defendant.”

Ultimately the Trust withdrew proceedings on the basis that sensitive papers might be released to KW which would be detrimental to her.

KW’s representatives sought costs against the Trust.

## **HELD**

No order for costs was made against the Trust

## **REASONING**

In legal proceedings costs normally follow the event ie the “loser” pays the “winner’s” costs. It was accepted by all parties, however, that this is not necessarily the case in the Family Division where the awarding of costs is “relatively rare but merited in some circumstances.” KW’s representatives argued that the Trust had adopted an unreasonable stance in that there was not sufficient expert evidence, the Trust had sought an injunction preventing the sensitive information from being disclosed and that they did not accede to a reasonable offer of settlement during the course of proceedings cf, *Re S (2015) UKSC 20*.

The Trust argued that to award costs against them in the present circumstances would not be appropriate. In this instance there had been a period of enquiry of Dr English’s three reports and the case of *Redcar and Cleveland Borough Council v PR (2019) 4 WLR 143*. The application had been made to protect KW’s welfare and she was a vulnerable person at risk of harm from the third defendant. The injunction application to prevent release of sensitive documents to KW had also been made to protect her. Ultimately the withdrawal application was made to protect the relationship between Trust personnel and KW.

In the present instance the judge commented , “Fundamentally, I have to decide whether the Trust have taken an unreasonable stance in pursuing proceedings.” The court concluded that they had not for the reasons the Trust’s representatives had given.

In coming to this conclusion, the judge also considered case law in relation to whether the High Court’s inherent jurisdiction could come into play when a person had capacity but was still vulnerable.

In the case of *SA (2005) EWHC 2942*, Munby J had considered this. Here he had concluded that the inherent jurisdiction was not confined to situations where a party lacked capacity to make their own decision about a case or was unable to communicate such decisions but , “the jurisdiction, in my judgement, extends to a wider class of vulnerable adults.” Factors which would prevent a vulnerable adult from making a fully consensual decision included, “deception, misinformation, physical disability, illness, weakness, (physical , mental or moral), tiredness, shock, fatigue, depression, pain or drugs.....”

A court must carry out the delicate balancing act between “paternalism and autonomy,” which needs to be carried out on the facts of each case.



# FOUR JURISDICTIONS FAMILY LAW FREE ONLINE CONFERENCE

**BELFAST 2021**

**Saturday 30th January 9:30am - 1:00pm**

## *A Bridge over Troubled Waters*

Our professional lives have changed significantly this year, perhaps not permanently.

Our legal landscape will change significantly and permanently as of the 1st January 2021.

This is the first time the Conference can proceed without physical attendance and without charge, so we would welcome and encourage all younger practitioners to attend.

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### CONFERENCE PROGRAMME

#### Opening

**9:30am** Mrs Justice Keegan  
Senior Family Judge of the High Court in Northern Ireland

#### Words of Welcome

Naomi Long MEP MLA,  
Minister of Justice, Northern Ireland

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#### Our Academic Programme

##### Introduction by Lady Hale

**9:55** Dervla Brown SC of Ireland will speak to her Paper  
*A Global Perspective on Habitual Residence- a worldwide tour of Supreme Court/  
CJEU Decisions*

**10:35** Professor Rebecca Bailey Harris will speak to her Paper  
*Brexit and Family Law - Where are we now?*

##### Contributions from individual lawyers from each Jurisdiction

Taina Moran,  
Director & Chartered Financial Planner at Tilney Financial Planning Ltd  
*Wealth & Wellbeing*

**12:15** Carly Schrever, Lawyer and Psychologist  
Judicial Wellbeing Advisor of the Judicial College of Victoria  
*Lawyer Stress - Unmentionable and Undeniable*

#### Closing

**1:00 pm** Henry Toner QC

Question and Answer session via online chat box.  
We suggest the CPD content should be 3 points.  
Papers will be available for attendees after the event.

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