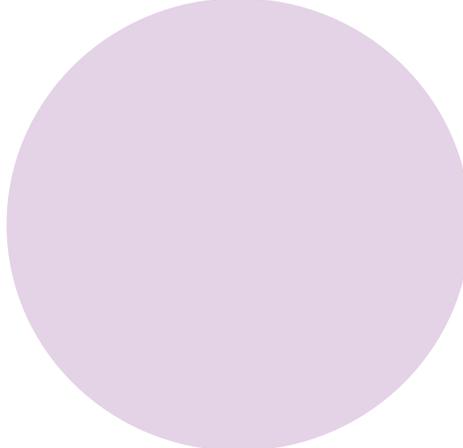
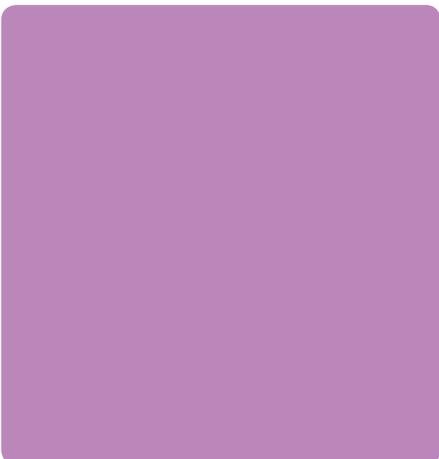
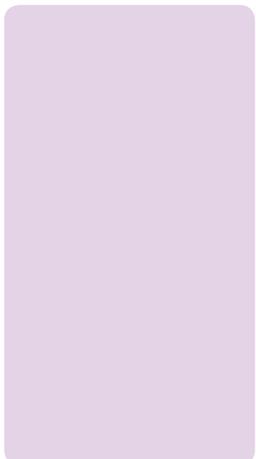




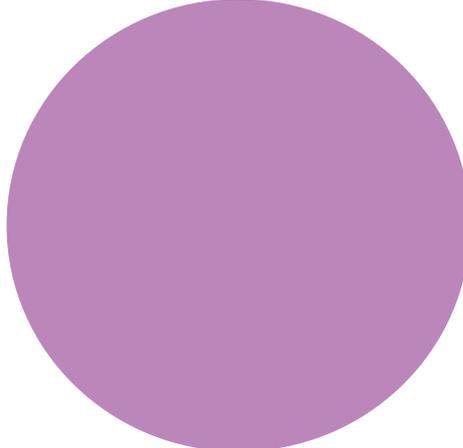
Child & Family Law Update

Issue 46

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Child & Family Law Update

Welcome to the Spring 2022 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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SAME PARTIES, SAME FACTS, DIFFERENT DELIVERY OF EVIDENCE

Francine McFarland, L.L.B, Solicitor¹

In Northern Ireland, from 1st October 2020 to the 30th September 2021, there were 31,470 domestic abuse incidents reported to the PSNI.² There were eight murders with a domestic abuse motivation, compared with four during 2019/20. In six of these murders, the victim was female, compared with two female victims in 2019/20.

Domestic Violence is commonly defined as; ‘threatening, controlling, coercive behaviour, violence or abuse (psychological, virtual, physical, verbal, sexual, financial or emotional) inflicted on anyone (irrespective of age, ethnicity, religion, gender, gender identity, sexual orientation or any form of disability) by a current or former intimate partner or family member’. Whilst domestic violence was formerly interpreted as physical violence, there is recent recognition for coercive control, described by Women’s Aid as creating...

‘...invisible chains and a sense of fear that pervades all elements of a victim’s life. It works to limit their human rights by depriving them of their liberty and reducing their ability for action.’³

Should the victim of domestic violence report the matter to the PSNI, the PSNI would commonly recommend that the individual seek legal advice to obtain a protective court order, such as a Non-Molestation Order.

Non-Molestation Order Applications

A Non-Molestation is an injunctive Order which protects parties from harassment, intimidation, and pestering from the Respondent party. Non-Molestation Orders are governed under Article 20 of the Family Homes and Domestic Violence (Northern Ireland) Order 1998.⁴ Article 3 of the 1998 Order provides a list of associated persons who can apply for such Order against the Responding party. This will commonly include husbands, wives, parties children, and siblings etc. Unfortunately, this does not automatically include ex partners, unless those parties have cohabited, they are engaged to marry, or they have children together.

If the parties do not fall within the realm of associated parties under Article 3, the alternative Court Order to apply for is a Civil Injunction, which follows a similar procedure, but before a County Court as opposed to the Magistrate Court level of the Domestic Proceedings Court in which Non-Molestation Order cases are heard.

Occupation Order Applications

If parties are cohabitating at the time in which the subject conduct occurs, the Applicant party may also seek an Occupation Order, which is governed under Article 11 of the 1998 Order. An Occupation Order permits the Applicant party to have peaceful enjoyment of a property or part of a property. If lodged as a standalone application, with no application for Non-Molestation Order, this does not necessarily mean that the Respondent party is prohibited from continuing

¹ Hastings Solicitors

² Domestic Abuse Incidents and Crimes Recorded by the Police Update to 31st March 2021 (psni.police.uk)

³ <https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/coercive-control/>

⁴ 1998 NI 6

to live within the same property. Both a Non-Molestation Order and Occupation Order can be applied for under the same Court application, namely a Form F1, F2 and supporting Statement of Evidence.

Court Process

In 2020, 3204 Non-Molestation Order Applications came before the Domestic Proceedings Court.⁵ This was in a year in which the Courts in Northern Ireland came to a sudden halt in March 2020, with the usual running order of Domestic Proceedings Court cases only being listed in September/October 2020.

Non-Molestation Order applications are more commonly filed with the Court on an Ex-parte basis, without the Respondent's knowledge, and therefore without ability to defend from the outset. The Applicant's Solicitor will often take the Applicant party's instructions the day before or on the morning in which the Court Application is filed. It will be the decision of the Judge who is sitting that day as to whether or not the case is meritorious of an Ex-parte Order under Article 23 of the 1998 Order. In short, the Applicant must show that; the Applicant or a relevant child would be at significant risk due to the conduct of the Respondent, that the Applicant could be deterred or prevented from pursuing such application if the application is not dealt with imminently, and lastly, if the Respondent was aware of such proceedings that they would then deliberately evade service causing prejudice to the Applicant and/or a child due to delay incurred.

Once the Court has adjudicated upon the Ex-parte application, the Court will re-list the case for Inter parties review on a date which will allow for service of documentation on the Respondent and to allow for the Respondent to engage legal representation to represent him or her before the Court.

At the inter parties Review, one of four things may happen;

1. The Applicant may withdraw their application having had the benefit of the Order for a few weeks and no longer requires the protection of the Court.
2. The Respondent party may provide the Applicant party with a signed Undertaking on foot of the Applicant withdrawing the application.
3. The Respondent party may consent to the granting of a Full Order being made in the Applicant's favour.
4. The Respondent party indicates that they wish to defend the application against them, and the matter is timetabled accordingly for hearing.

The timetabling of the case which may be dependent upon several factors, namely, availability of parties and witnesses, the pace of related criminal proceedings, and the filing of evidence such as PSNI Domestic Violence Reports and CCTV etc.

One may be reluctant to agree to the making of a Non-Molestation Order against them if the parties have children together. Failure to defend Non-Molestation Order Proceedings could be deemed as acceptance of the domestic violence alleged and could have serious implications on Children Order Proceedings if the Respondent party seeks contact with the parties children if he or she is not the resident parent.

⁵ NICTS Judicial Statistics | Department of Justice (justice-ni.gov.uk)

Related Criminal Proceedings

Non-Molestation Order Proceedings can often run parallel to serious criminal proceedings, and whilst often against the Respondent, can sometimes include both Applicant and Respondent as Defendant parties. However, there would often be a reluctance by the Respondent party to proceed with the hearing of a Non-Molestation Order in a civil court, whilst criminal proceedings are ongoing, where the sanctions are much more serious should the Respondent be convicted. The Respondent may wish to avoid prejudicing oneself in a civil court should their recorded evidence thereafter be used in the criminal court. Also, if the Respondent is later convicted in a criminal court, the injured party could be granted a Restraining Order under Article 7 of the Protection from Harassment (Northern Ireland) Order 1997, removing the need for a Full Non-Molestation Order.

However, on many occasions, cases will be contested before the Domestic Proceedings Court without related criminal proceedings, and/or in less frequent occasions where the Respondent party wishes to proceed with the hearing irrespective of a pending criminal prosecution.

Measures available to vulnerable witnesses at hearing

At the hearing of a Non-Molestation Order application, both parties are required to provide their evidence in chief and will be subject to cross examination. The principle of orality ensures the right to fair trial and allows for the witnesses' evidence to be tested in a public forum to enable the Court to draw conclusions regarding their credibility.

This can be a terribly daunting experience for the Applicant who potentially has not seen their husband/wife etc since the incident which gave rise to the Ex-parte Application, which may have been months previous. Whilst there are many support groups, such as Women's Aid, who can attend the Court building with the Applicant, the Applicant party will not be assisted by Special Measures such as those afforded to witnesses in criminal proceedings.

Within a criminal court setting, the use of special measures is governed under The Criminal Evidence (Northern Ireland) Order 1999. These measures are detailed from Article 11 to 18. The Public Prosecution Service make the application on behalf of the witness and/or injured party, and it will be open to the Defence to scrutinise and make representations against the granting of such special measure should they feel that such measure would be inappropriate. The purpose of utilising a special measure is to permit a witness to give their best evidence with reasonable adjustments to be made without fear or intimidation.

The Applicant party in Non-Molestation Order Proceedings could therefore be faced with providing their evidence in Court, with a person who has inflicted serious domestic violence upon them which may have lasted months or years. If the Applicant is a particularly vulnerable individual, evidence and submissions may be presented to the Court to enable the Court to provide directions in relation to the seating position of the Applicant and the Respondent. The Respondent party is however entitled to hear the evidence of the Applicant within the same Court arena, without the Applicant having the protection of a screen or live link for example.

Judicial thoughts on Special Measures in Civil Proceedings

The availability of special measures in civil proceedings is not a topic of discussion which has been left untouched. Whilst not dealing directly with the usage of special measures in the Domestic Proceedings Court, The Honourable Mr Justice Weir (as he then was) issued

a Guidance Note in November 2007⁶ in relation to the use of video link facilities for a range of family court proceedings, including Domestic Proceedings. The Honourable Mr Justice Weir referred to the usage of videolink facilities as a “...cost effective and efficient means of facilitating evidence from witnesses...”, and as a “...convenient way of dealing with a number of categories of witnesses...” to include vulnerable adults and children. The Guidance Note details that the request for use of the video link system could be done so by completing a short form, leave would be required from the Court, and either consent is obtained from all parties involved or “...in the absence of agreement the application shall be determined at a directions appointment.”⁷

The Northern Ireland Law Commission reported on this particular issue in 2010, which concluded that:

“Having taken into account the views of consultees, having deliberated on the merits of introducing a scheme of special measures in civil proceedings and having considered the likelihood of the uptake by witnesses of such measures...protection for certain witnesses in civil proceedings will promote access to justice for those witnesses and will offer valuable practical assistance to people who might experience difficulties in giving oral evidence directly in a courtroom setting. The Commission considers that the best method of achieving such a scheme is to implement it on a statutory basis. Not only does this promote a consistent approach in courts across the jurisdiction, it also allows such a scheme to be exposed to the rigours of a transparent and accountable law-making process.”⁸

The Commission concluded that, based on consideration of the current law and practice and the views of consultees, that a strong case can be made for creating a statutory regime for the provision of special measures for certain witnesses in civil cases.

Lord Justice Gillen touched upon the findings of the Northern Ireland Law Commission in his 2017 report, ‘Review of Civil and Family Justice in Northern Ireland Review Group’s Report on Civil Justice’. A key recommendation of Lord Justice Gillen was the commitment to paperless courts, digitalisation, and moderation of the court process, with one never predicting the magnitude of such recommendation when the wave of Covid 19 crashed. If there ever was a ‘I told you so’ moment, that would be it.

Lord Justice Gillen highlighted that such recommendations by the Commission in relation to the use of special measures of witnesses were yet to be implemented in the civil justice or family justice context. Under the heading of ‘Disability in the civil courts’, Lord Justice Gillen stated:

“We have visited this issue in the Family Justice Review. We can see no reason why the recommendations of the NILC in this regard should not be implemented if we are to comply with our domestic and international obligations to ensure that the disabled are not to be deprived of real access to justice.” (p216.)

In his recommendations, he stated,

“...Northern Ireland Law Commission recommendations to be adopted; and the relevant department(s) to expedite implementation of the Civil Evidence Bill.”

⁶ Guidance Note 1 of 2007.pdf (judiciaryni.uk).

⁷ Remote hearings in the Family Justice system: a rapid consultation - Mary Ryan, Lisa Harker & Sarah Rather.

⁸ 26 NILC 10 (2011).

The Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021

In March 2021, the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 was passed into law in Northern Ireland which provides for a specific criminal offence of domestic violence. The new legislation has the effect of criminalising coercive and controlling behaviour, thus bringing Northern Ireland into line with the other jurisdictions within the UK and Ireland, and with relevant human rights standards.

Article 36 of this Act prohibits a personal litigant, who has been convicted of or given a caution, or is charged with a specified offence, from cross examining a witness who is the victim, or alleged victim, of that offence in family proceedings.⁹ Likewise no person who has been a victim or alleged victim, may cross examine someone who has been convicted of or given a caution for, or is charged with, that offence. Under Article 88 of the Magistrates Court (Northern Ireland) Order 1981, “family proceedings”, includes applications brought under the Family Homes and Domestic Violence (Northern Ireland) Order 1998.¹⁰

Whilst this special measure may go some way to comfort a victim of domestic violence, it does not provide anywhere near the same recognition or protection of a victim as would be available in a criminal court, where the same facts are presented with the same parties. The same victim in a Domestic Proceedings Court will not be behind a screen and they will not be able give their evidence via live link from another room.

⁹ Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 Article 36.

¹⁰ *Supra cit.* at Article 88.

HABITUAL RESIDENCE OF CHILDREN – A GLOBAL PERSPECTIVE

Dervla Browne, SC, Barrister

Introduction

Over the past decade there have been a number of international decisions by higher courts concerning the meaning of habitual residence and the circumstances in which a child will be found to be habitually resident in a contracting or Member State for the purposes of the Hague Convention and/or EC Council Regulation 2001/2003. As we will see, there has been a definite change in the approach of the courts, moving away from a “parental-intention centred” approach to that of a “hybrid approach”. In this paper I examine some of these cases and hope to give a critical analysis of same. Whether or not the shift in perspective is one which is welcome is a matter for discussion.

Cases reviewed include the UK Supreme Court decisions in *A -v- A* (2013) and *A.R. -v- R.N.* (Scotland) (2015); two decisions of the Irish Court of Appeal from 2015/2016; the important Canadian Supreme Court case of *Balev* (2018) the decision of the US Supreme Court in *Monasky -v- Taglieri* (2020) and a number of decisions of the Court of Justice of the EU. They deal with a new-born infant who had never been present in the jurisdiction in which it was asserted she was habitually resident; time limited consents; shuttle agreements; and how the views of older children are relevant.

Parental intention

The older cases are authority for the proposition that although habitual residence is essentially a question of fact, the situation of the parents, and their shared intention, must in many cases be determinative in establishing the habitual residence of their children, particularly infants. In addition, it is not possible for one parent to unilaterally change the place of residence of a child, as such an approach would undermine the operation of the Hague Convention.

These principles are succinctly summarised in the judgement of the Irish Supreme Court in the 2009 case of *S (A) v S(C)*¹

“In *PAS v AFS*, Fennelly, J. in placing the issue of *habitual residence* in its real living context, stated:

“The Convention deliberately left the notion of habitual residence undefined. The courts of the Contracting States have to be free to apply it to the facts, having considered all the circumstances of the case. Human situations are infinitely variable. Habitual residence will be perfectly obvious in the great majority of cases. It is an obvious fact that a new-born child is incapable of making its own choices as to residence or anything else. What the courts have to look at is the situation of the parents and their choices. Where the child has, for a substantial period, been resident in one country with both its parents, while they are in a stable relationship particularly if they are of the same nationality, the answer will usually be fairly obvious. This is the normal state of affairs described in a passage from a judgment in one English case, which has been widely quoted, cited in the High Court

¹ [2010] 1 IR 370

judgment and relied on by the Applicant. Waite J in Re B: (Minors: Abduction) (No. 2) [1993] 1 F.L.R. 993 at page 995 stated:"

- "1. The habitual residence of young children of parents who are living together is the same as the habitual residence of the parents themselves and neither parent can change it without the express or tacit consent of the other or an order of the court.*
- 2. Habitual residence is a term referring, when it is applied in the context of married parents living together, to their abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being whether it is of short or of long duration.*
- 3. All that the law requires for a "settled purpose" is that the parents' shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled.*
- 4. Although habitual residence can be lost in a single day, for example upon departure from the initial abode with no intention of returning, the assumption of habitual residence requires an appreciable period of time and a settled intention.....Logic would suggest that provided the purpose is settled the period of habitation need not be long.*

In the opinion of the writer, there was and continues to be a rationale for such an approach.

As pointed out by Schuz the UK model required a "settled intention" whereas the US authority (*Mozes v. Mozes*²) was that there had to be an intention to abandon the prior habitual residence.

In *LK -v- Director -General, Department of Community Services*, the High Court of Australia on appeal from the Family Court of Australia delivered judgment on the 11th of March 2009.³ The case concerned the move from Israel to Australia of a mother and four children aged between 15 months and 8 years. They travelled in May 2006. Both Kay J and the full Family Court of Australia had found that the children continued to be habitually resident in Israel at the time the mother refused to return to Israel in July 2006.

On appeal, the Court reviewed the meaning of habitual residence. In its judgment the Court observed:

"Although intention is a necessary element in deciding domicile of choice, and habitual residence is chosen as a connecting factor in preference to domicile, examination of a person's intentions will usually be relevant to the consideration of where that person can habitually reside".

The court also stated that:

"When speaking of the habitual residence of a child it will usually be very important to examine where the person or persons who are caring for the child live- where those persons have their habitual residence."

² 239 F.3d 1067 (9th Cir. 2001).

³ [2009] HCA 9.

In this case before she left Israel, the mother registered the children as Australian citizens and procured enrolment of the two older children at an Australian private school. All of those steps were taken before the father asked in July 2006 for the children to be returned to Israel. The court found that the absence of a final decision positively rejecting the possibility of returning to Israel was not necessarily inconsistent with ceasing to reside there habitually. When considering where a child is habitually resident, attention cannot be confined to the intentions of the parent who in fact has the day-to-day care of the child. The Court accepted that the general rule is that neither party can unilaterally change a child's place of habitual residence. The assent of the other parent or a court order will be necessary. The Court looked as to whether there was a uniform interpretation of the international treaty by the contracting states. The Court stated that if the references in *R -v- Barnett ex parte Shah*⁴ to "settled intention" were to be understood as requiring inquiries as to intention such as those that are necessary to the application of the law of domicile, that would be sharply at odds with the use of the expression "habitual residence." The Court found that the intention of the parents were not the only factors which had a bearing upon whether in July 2006 the children were habitually resident in Israel. The Court found that what was decisive is that when the children left Israel both parents agreed that unless there was reconciliation they would stay in Australia. Therefore, the children were not habitually resident in Israel in July 2006.

In the US judgment of *Friedrich*⁵ (as early as 1996) the Court of Appeal 6th Circuit stated:

"We agree that habitual residence must not be confused with domicile. To determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions. T. was born in Germany to a German father and an American mother and lived exclusively in Germany except for a few short vacations before Mrs. F. removed him to the United States. Mrs. F. argues that despite the fact that T.'s ordinary residence was always in Germany, T. was actually a habitual resident of the United States because: 1) he had United States citizenship; 2) his permanent address for the purpose of the United States documentation was listed as Ironton, Ohio; and 3) Mrs. F. intended to return to the United States with T. when she was discharged from the military. Although these ties may be strong enough to establish legal residence in the United States, they do not establish habitual residence. A person can have only one habitual residence. On its face, habitual residence pertains to customary residence prior to the removal. The court must look back in time, not forward. All of the factors listed by Mrs. F. pertain to the future. Moreover, they reflect the intentions of Mrs. F.; it is the habitual residence of the child that must be determined. Mrs. F. undoubtedly established ties between T. and the United States and may well have intended for T. to move to the United States at some time in the future. But before Mrs. F. removed T. to the United States without the knowledge or consent of Mr. F., T. had resided exclusively in Germany. Any future plans that Mrs. F. had for T. to reside in the United States are irrelevant to our inquiry. The district court appears to agree that before the argument of July 27, 1991, T. was a habitual resident of Germany. The district court, however, found that T.'s habitual residence was "altered" from Germany to the United States when Mr. F. forced Mrs. F. and T. to leave the family apartment. Habitual residence cannot be so easily altered. Even if we accept the district court's finding that Mr. F. forced Mrs. F. to leave the family apartment, no evidence supports a finding that Mr. F. forced Mrs. F. to remove T. from Germany; Mr. F. was not even aware of the removal until after the fact. T.'s temporary three-day stay on a United States military base did not transfer his habitual residence to the United States, even if it was precipitated by Mr. F.'s angry actions in a marital dispute. As a threshold

⁴ 1983 2 AC 309.

⁵ 78 F.3d 1060 (6th Cir. 1996).

matter, a United States military base is not sovereign territory of the United States. The military base in Bad Aibling is on land which belongs to Germany and which the United States Armed Services occupy only at the pleasure of the German government. See Dare v. Secretary of Air Force, 608 F. Supp. 1077, 1080 (D. Del. 1985). More fundamentally, T.'s habitual residence in Germany is not predicated on the care or protection provided by his German father nor does it shift to the United States when his American mother assumes the role of primary caretaker. T.'s habitual residence can be "altered" only by a change in geography and the passage of time, not by changes in parental affection and responsibility. The change in geography must occur before the questionable removal; here, the removal precipitated the change in geography. If we were to determine that by removing T. from his habitual residence without Mr. F.'s knowledge or consent Mrs. F. "altered" T.'s habitual residence, we would render the Convention meaningless. It would be an open invitation for all parents who abduct their children to characterize their wrongful removals as alterations of habitual residence. This is a simple case. T. was born in Germany and resided exclusively in Germany until his mother removed him to the United States on August 2, 1991; therefore, we hold that T. was a habitual resident of Germany at the time of his removal".

Although commentators have suggested that *Friedrich* demonstrates a child centred approach, the court does take the view that a unilateral change in residence cannot happen as this would render the Convention meaningless.

Towards a more child centred approach

It was in the context of the European Court of Justice cases that the child-centred approach came to the forefront. In the case of *Proceedings brought by A*⁶ the Court stated

"The 'habitual residence' of a child, within the meaning of Article 8(1) of the Regulation, must be established on the basis of all the circumstances specific to each individual case.

In addition to the physical presence of the child in a Member State other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment.

In particular, the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration.

As the Advocate General pointed out in point 44 of her Opinion, the parents' intention to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or lease of a residence in the host Member State, may constitute an indicator of the transfer of the habitual residence. Another indicator may be constituted by lodging an application for social housing with the relevant services of that State.

By contrast, the fact that the children are staying in a Member State where, for a short period, they carry on a peripatetic life, is liable to constitute an indicator that they do not habitually reside in that State."

⁶ Case C-523/07.

It now no longer appeared to be the case that parental intention was determinative. In *Mercredi -v- Chaffe*⁷, the court referred to social integration of the child, but in that case, which concerned the lawful move of a young infant, also emphasized the need to look at the circumstances/intention of the mother.

*“To ensure that the best interests of the child are given the utmost consideration, the Court has previously ruled that the concept of ‘habitual residence’ under Article 8(1) of the Regulation corresponds to the place which reflects **some degree of integration by the child in a social and family environment**. That place must be established by the national court, taking account of all the circumstances of fact specific to each individual case (see A, paragraph 44).*

Among the tests which should be applied by the national court to establish the place where a child is habitually resident, particular mention should be made of the conditions and reasons for the child’s stay on the territory of a Member State, and the child’s nationality (see A, paragraph 44).

As the Court explained, moreover, in paragraph 38 of A, in order to determine where a child is habitually resident, in addition to the physical presence of the child in a Member State, other factors must also make it clear that that presence is not in any way temporary or intermittent.

In that context, the Court has stated that the intention of the person with parental responsibility to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or rental of accommodation in the host Member State, may constitute an indicator of the transfer of the habitual residence (see A, paragraph 40).

In that regard, it must be stated that, in order to distinguish habitual residence from mere temporary presence, the former must as a general rule have a certain duration which reflects an adequate degree of permanence. However, the Regulation does not lay down any minimum duration. Before habitual residence can be transferred to the host State, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character. Accordingly, the duration of a stay can serve only as an indicator in the assessment of the permanence of the residence, and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case.

In the main proceedings, the child’s age, it may be added, is liable to be of particular importance.

The social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, comprises various factors which vary according to the age of the child. The factors to be taken into account in the case of a child of school age are thus not the same as those to be considered in the case of a child who has left school and are again not the same as those relevant to an infant.

As a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of.

⁷ Case C-497/10PPU.

That is even more true where the child concerned is an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where, as in the main proceedings, the infant is in fact looked after by her mother, it is necessary to assess the mother's integration in her social and family environment. In that regard, the tests stated in the Court's case-law, such as the reasons for the move by the child's mother to another Member State, the languages known to the mother or again her geographic and family origins may become relevant."

Emphasis added.

In *C -v- M*.⁸ the question arose as to whether a move to Ireland on foot of an order of a French court, which was provisionally enforceable and was subsequently the subject of a successful appeal could have the effect of changing the habitual residence of the child. The Court reiterated that the question of habitual residence was a question of fact- and that parental intention was one element of the factors.

In that case the court appeared to approve a balancing exercise.

"When examining in particular the reasons for the child's stay in the Member State to which the child was removed and the intention of the parent who took the child there, it is important..... to take into account the fact that the court judgment authorising the removal could be provisionally enforced and that an appeal had been brought against it. Those factors are not conducive to a finding that the child's habitual residence was transferred, since that judgment was provisional and the parent concerned could not be certain, at the time of the removal, that the stay in that Member State would not be temporary.

*Having regard to the necessity of ensuring the protection of the best interests of the child, those factors are, as part of the assessment of all the circumstances of fact specific to the individual case, **to be weighed against other matters of fact which might demonstrate a degree of integration of the child in a social and family environment since her removal**, such as those mentioned in paragraph 52 of this judgment and, in particular, the time which elapsed between that removal and the judgment which set aside the judgment of first instance and fixed the residence of the child at the home of the parent living in the Member State of origin. However, the time which has passed since that judgment should not in any circumstances be taken into consideration."* (Emphasis added)

Judgments of the Supreme Court, United Kingdom

In 2013 the UK Supreme Court decided *A-v- A*⁹ where the issue arose as to the jurisdiction of the High Court to make Orders in wardship about children who were then resident in Pakistan. The couple had three children and in February 2010 the mother became pregnant with Haroon. At that stage, the mother was in Pakistan having gone on a trip with the three elder children on the 13th of October 2009 to visit her father. She stated she was coerced to remain in Pakistan. Haroon was born in Pakistan on the 20th of October 2010. The mother returned to England in May 2011.

The Supreme Court indicated that habitual residence under the 1986 Act and the Hague Convention and the Regulation should be interpreted uniformly. The Supreme Court found that there had been previous attempts to overlay the factual concept of habitual residence with

⁸ Case C-376/14PPU.

⁹ [2013] UKSC 60.

legal constructs. The most important one of those was that where two parents had parental responsibility for a child, one could not change the child's habitual residence unilaterally. As the father did not raise a challenge in the Supreme Court in relation to this concept, the Court did not deal with it. However, Lady Hale noted that the rule was not universally adopted and states "*nor is there a hint of it in the European jurisprudence*". She stated it would not inevitably be a charter for abduction, as the Regulation provides that the court of the original jurisdiction continued to retain jurisdiction for at least a year after a wrongful removal or retention. "*As Lord Hughes also points out, the 'rule' is more relevant in retention than removal cases, but the answer may lie in treating the unilateral change of habitual residence as the act of wrongful retention, even if it takes place before the child was due to be returned. The matter may therefore require fuller consideration in another case, but it is not necessary for us to express a concluded view.*"

The Court found that once the Court adopted "concepts" it becomes tempting to construct another rule such as that the child's habitual residence is necessarily that of his primary carer or carers. The Court set out a number of principles:

- Habitual residence is a question of fact and not a legal concept such as domicile.
- There is no legal rule akin to that whereby a child automatically takes the domicile of his parents.
- The Regulation must be interpreted consistently between the Hague Convention and the European Regulation. The test adopted by the European Court is that habitual residence "reflects some degree of integration by the child in the social and family environment in the country concerned and that depended on numerous factors including the reasons for the family's stay in the country in question."
- The Court found that the test derived from *R. v. Barnett London Borough Council ex parte Shah* should be abandoned when deciding the habitual residence of a child.
- The social and family environment of an infant or young child is shared with those upon whom he is dependent. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned.
- The essentially factual and individual nature of the enquiry should not be glossed with legal concepts which would produce a different result from that which the factual enquiry would produce.
- It is possible that a child may have no country of habitual residence at a particular point in time.

The judgment of Lord Hughes deals specifically with the issue of wrongful retention and change of habitual residence. He specifically hypothesized actions which were actually taken in the *DE* case (see below) steps such as enrolment in school; obtaining social security number – these steps taken without the knowledge of the other parent. Lord Hughes stressed that such a situation was not rare. He references Lady Hale's judgment wherein she refers to Article 10 as providing for this situation. However, as Lord Hughes points out Article 10 can only apply if, by the time of the wrongful retention, a change in habitual residence has not taken place.

In *RE LC*¹⁰ the UK Supreme Court found that the views an adolescent were relevant to his or her habitual residence.

In 2015, in the Scottish case of *AR v. RN*,¹¹ Lord Reed delivered the judgment of the Supreme Court, in a case concerning a move from France to Scotland in July 2013. The mother and two

¹⁰ [2014] UKSC 1.

¹¹ Judgment given 22nd of May 2015 [2015] UK SC 35.

children moved in July 2013 with the agreement of the children's father. It was his evidence that it was a time limited move for 12 months. The mother said that it was a permanent move. The children were in Scotland from July 2013 until November 2013 when the mother discovered infidelity on the part of the father and told him that the relationship was over. She then issued proceedings in Scotland. By that stage, the house in France had been sold. The question was whether the children were habitually resident in France immediately before the 20th of May 2013.

The Supreme Court stated that habitual residence for the purpose of applying the Hague Convention and Regulation is to be determined in accordance with the guidance given by the Court in *A v. A* and in *Re L* and *re LC*. It was common ground that that guidance is consistent with the guidance given by the Court of Justice in proceedings brought by *A C-523/07; Mercredi v. Chaffe C- 497/10* and *C v. M C-376/14PPU*. The Court reiterated that it was the stability of the residence that was important, not whether it is of a permanent character and that there was no requirement that a child should be resident in the country in question for a particular period of time let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely.

Habitual residence is a question of fact and requires an evaluation of all relevant circumstances. It focuses upon the situation of the child with the purposes and intention of the parents being merely among the relevant factors. It is necessary to assess the degree of integration of the child into a social and family environment in the country in question. The social and family environment of a young child is shared with those of the parents or others on whom he/she is dependent and therefore it is necessary in that case to assess the integration of that person or persons in the social and family environment of the country concerned.

The Supreme Court specifically approved the conclusion reached by the Court of Appeal in *Re H (Children)*¹² that there is no "rule" that one parent cannot unilaterally change the habitual residence of a child. The Court also held that the function of an appellate court in relation to a lower court's finding as to habitual residence was limited. The Court found that the Lord Ordinary had focused entirely on whether there had been a joint decision to move permanently to Scotland and in doing so that he failed to apply the guidance given in the authorities. Lord Reed stated that parental intentions in relation to residence are a relevant factor, but they are not the only relevant factor. He stated that an intention to live in the country for a limited period is not inconsistent with becoming habitually resident there. The important question is whether the residence has the necessary quality and stability and not whether it is intended to be permanent.

In the case of *Re B A Child Habitual Residence*¹³ the Supreme Court looked at jurisdiction from the point of view of the Court exercising jurisdiction under the Children Act 1989 or under the inherent jurisdiction of the Court. The Supreme Court by majority found that the new criteria required not the child's full integration in the environment of the new state but only a degree of it and it was clear that in certain circumstances the requisite degree of integration could occur quickly. The concept operated in the expectation that when a child had gained a new habitual residence, he lost his old one. The Court found that intention, in the instant case, parental intention, was no longer dispositive in that respect and analysis of a child's habitual residence which afforded to parental intention a dispositive effect was inconsistent with the child focused European concept now adopted in England and Wales and consigned a large number of children to the limbo of lacking any habitual residence in circumstances in which the modern law expected such a result to be exceptional, albeit conceivable.

¹² [2014] EWCA Civ 1101.

¹³ [2016] UKSC 4.

Developments in Ireland

In the Irish case of *DE v. EB*¹⁴ (20th of May 2015), the Court of Appeal heard an appeal from the High Court in which the mother appealed against a Hague order for return to France. The mother was an Irish national who lived and worked in France for some time, the father was a French national who lives and works in France. They were not married to one another; they had been cohabitating since May 2008. The child was born in France, on the 26th of October 2013, both father and mother had custody rights. On the 23rd of March 2014 both came to Ireland for the purpose of introducing the child to the mother's family. The father returned on the 31st of March 2014. The mother was on parental leave and was due to return to work on the 11th of July. However on the 27th of March 2014 she sent an email to her work saying that she was resigning. She applied for social welfare in Ireland and registered the child in April with a general practitioner. She did not inform the father of these steps at the time. She returned to France on the 8th of May 2014 and then came back to Ireland on the 15th of May 2014. The father bought the ticket for the mother and child for the return to France on the 28th of May, but she changed her return date to the 12th of June 2014 when they went back to France again. They came back to Ireland on the 22nd of June 2014, he gave consent to travel on each one of those occasions but said that it was for a limited purpose of a short visit by her to Ireland. In July 2014, the mother would not give the father a proposed date for when she would return. On the 18th of July 2014 he emailed her formally asking her to bring her back. When she did not, he applied on the 29th of July for assistance in procuring the return.

The question was whether the child was habitually resident in Ireland prior to the wrongful retention on or about the 20th of July 2014. In the High Court, the submissions made on behalf of the father relied in part upon the judgments of the Supreme Court in *AS v. CS* [2010] IR 370 and *PAS v. AFS* [2004] IESC 95 (referred to above) that where a young child is living with both parents, both of whom have parental authority, neither party can change the habitual residence of the child without the consent of the other parent. On behalf of the mother, it was submitted in a case such as this where the Regulation applies, the consent of a parent to the change of habitual residence is no longer determinative but is simply a factor to be taken into consideration, that the High Court was not bound by the Supreme Court decisions to that effect by reason of the Court of Justice decisions in *Mercredi v. Chaffe*, re *A and C v. M*. The trial Judge did not expressly determine that issue. However, she applied the considerations identified by CJEU in the above judgments and in particular the points she considered raised by the judgment in *Mercredi*.

On appeal the mother argued that the overriding consideration was where the centre of interests of the child lay, as was now required by the judgments of the CJEU and in particular paragraph 50 of the judgment of *C v. M* where it is stated that the concept of habitual residence is shaped in the light of the best interests of the child in particular on the criterion of proximity. It was accepted that absence of consent by the father was a factor to be taken into account. This could not be determinative.

Counsel for the father argued that the High Court Judge reached her decision in accordance with the correct application of the criteria by the CJEU and drew the court's attention to what she submitted would be the far-reaching implications for the concept of wrongful retention under the Hague Convention if the submissions of the mother were accepted. Counsel for the father did not ask the Court to rely on the earlier approach of the Supreme Court. The Court found that the facts of *C v. M* were of some importance to the consideration of the judgment

¹⁴ [2015] IECA 104.

of the CJEU. In that case the mother had been permitted by a judgment of a French Court to bring the child from France to Ireland.

There was an appeal against that judgment. The mother moved as there was no stay in the judgment on the 5th of March 2013. The Cour d'Appel overturned the first judgment and ordered that the child should reside with the father. As Finlay-Geoghegan J stated, the fundamental approach of the CJEU is that a child's habitual residence must be established by the national court taking account of all of the circumstances and all the facts specific to each case. Finlay-Geoghegan J. distinguished the facts of *Mercredi* as the facts of that case were that the infant had left England with its mother who had sole parental rights and the sole right to determine, at the time she left England, in which State the infant might live, that was a very important consideration. By contrast in *C v. M*, the CJEU was considering the determination of the habitual residence of the child in the context of an allegation of wrongful retention. It was considering the determination by a national court of habitual residence where the mother had moved the child lawfully, in the sense that she did so pursuant to an order which was stated could be provisionally enforced and against which an appeal had been brought.

The CJEU in that case stated that those factors are not conducive to a finding that the child's habitual residence was transferred, since that judgment was provisional, and the parent concerned could not be certain at the time of the removal that the stay in the Member State would not be temporary. Finlay-Geoghegan J. stated that this comment emphasised the approach in a case where the parent who has removed the child does not have the absolute or sole right to determine that the child should move to live in another Member State. The Court in *C v. M* in paragraph 57 stated that such factors are to be *weighed against other matters of fact which might demonstrate a degree of integration of the child in a social and family environment since the removal*, such as those mentioned in paragraph 52 of this judgment. Finlay-Geoghegan J found that it was incorrect to submit that the overriding consideration must be where the centre of interests of the child at the relevant time lies, in particular by reference to her integration in a social and family environment in a Member State to which she has been removed. It is rather the case that all of the relevant factors must be taken into consideration including of course the centre of interests of the child and, where relevant, one weighed against the other.

The Court found in a case where both parents hold parental responsibility and each have a right to participate in a decision as to where a child should live, a consent given for a visit of limited duration or, to put it another way, the absence of a consent to a change in the habitual residence is a factor to be taken into account and weighed against other relevant factors.

"It does not appear to me that the judgments of CJEU when considered collectively in the context of the relevant features of each case identify that any one or more competing factors should be given an overriding consideration. The weight to be attached to each will depend on the facts of each individual case. Different considerations will apply depending on all the different factors identified by CJEU." The Court said that if it were otherwise it would set at nought the entire concept of wrongful retention.

"In all cases of alleged wrongful retention, the child will have spent time in the Member State to which it is moved. It is of the essence of wrongful retention as distinct from wrongful removal that the child moved lawfully from its member state of habitual residence to another state but has not returned at the end of that period for which permission or consent was given. Wrongful retention will only arise if, at the end of the permitted period, the child remains habitually resident in its state of origin. Unless a Court may give appropriate weight to the conditions and permissions under which are reasons for which

the child moved together with all other relevant identified factors in assessing habitual residence, it is difficult to envisage wrongful retention as a concept surviving.”

In the case of *KW v. PW*,¹⁵ a five-member Court of Appeal delivered judgment on the 25th of November 2016 in relation to 5 and 3-year-old boys who came to Ireland from Australia. They were born and raised in Australia to an Irish father and Australian mother. The parents were married, and both had parental rights. They married in 2010 and they had lived in Australia until 2016. In 2016, the husband and eldest son arrived on the 7th of May 2016 and the wife followed with the younger boy on the 4th of June 2016. The children had been present in the State since those dates. There was much dispute in relation to the circumstances of the move to Ireland, the mother saying that the father had moved in circumstances where he had indicated that there was a threat to his life and that he had to move to Ireland suddenly and quickly and that she agreed on the basis that if matters did not work out, they would return to Australia. She said that she was given from the 3rd to the 6th of May 2016 to make the decision. The father left with one of the children on the 7th of May 2016. The wife had no alternative but to follow with the younger child. The father said the parties had agreed the move and that it had been discussed many times. The parties separated on the 2nd of July 2016. The husband applied to court on the 8th of July 2016 for an order preventing the removal the children from the jurisdiction. The wife issued Hague proceedings stating that the children were wrongfully retained in this jurisdiction.

In that case the Court reviewed *PAS v. AFS*, UK authorities and *DE v. EB* just referred to. In the particular circumstances of the case, the Court found that immediately prior to the events giving rise to the present application the children plainly had a habitual residence in Australia. The question was whether they lost their habitual residence in Australia. The Court of Appeal placed weight on *AS v. CS* and in particular the judgment of McMenamin J in the High Court where the Court emphasised whether or not the parties had established an intention to reside in Ireland on a long-term continuous basis. The Court referred to the fact that that decision had been confirmed by the Supreme Court.

The Court placed weight on the intention of the parties and referred to proceedings brought by A and the reference to the parents' intention to settle permanently with the child in the Member State. The Court placed emphasis on the fact that the couple still owned another property in Australia, the mother's job was still open, there was little advanced preparation and preplanning for a medium term move to Ireland. One child identified himself as Australian stating that he was simply here on holidays. The Court referred to the CJEU decisions setting out that concept of habitual residence must be interpreted as meaning that it corresponds whether it is some degree of integration by the child in a social and family environment. It was clear that the duration of the stay was short, it cannot be said that it was altogether regular. The husband brought them more or less at the last minute and the others travelled some 3-4 weeks later. The Court found that the act of taking the children's passports from the 2nd of July 2016 constituted a unilateral action to which the mother did not consent and it amounted to a breach of the rights of custody which amounted to a wrongful retention.

In 2018¹⁶, Ms. Justice Ni Raifeartaigh gave a judgment in the High Court in which she was asked to determine where children who had moved between Ireland and France over a number of years were habitually resident. The High Court Judge as she then was, reviewed the authorities finding that habitual residence was highly fact specific and citing *PAS v. AFS*

¹⁵ [2016] IECA 364.

¹⁶ S.S. v K.A. [2018] IEHC 795.

together with the ECR jurisprudence including *UD v. XB*, *C v. M.* and *Mercredi v. Chaffe*. She also referred to the two Court of Appeal decisions in 2016 in determining that the children were habitually resident in France at the date of the alleged wrongful retention.

Recent caselaw in the United States

On the 25th of February 2020 the United States Supreme Court handed down a judgment in the case of *Monasky v. Taglieri*.¹⁷ In that case Monasky was a US citizen and mother of the child in question. Taglieri was an Italian citizen and was the child's father. They were married in 2011 while residing together in the United States. In 2013 they relocated to Milan in Italy. After she became pregnant in 2014, he moved to Lugo and the parties continued to plan for the birth of their child in Italy, they researched childcare options, bought baby supplies and obtained a larger residence in Milan. After the child was born in 2014 Monasky told Taglieri that she wanted a divorce and she anticipated returning to the United States. Monasky and the infant later joined Taglieri in Lugo and in March 2015 they sought shelter in a domestic violence safe house, two weeks later they left Italy for Ohio. Within months of her departure, Taglieri petitioned the District Court in the northern district of Ohio for the return of the child to Italy under the Hague Convention on the basis that Italy was the child's country of habitual residence. After a bench trial the District Court determined that the facts of the case including the infancy of the child at the time, the parties shared intention to raise the child in Italy and the fact that the parents had no definitive plan to relocate to the United States. Thus, the District Court determined that the child's habitual residence was Italy and ordered the child's return to Italy. The mother appealed but her application for a stay on the return order pending appeal was denied. In December 2016 the almost two-year-old child was returned to Italy to her father. The child remained in Italy while Monasky appealed the return order.

Monasky's main argument was that the District Court improperly assessed shared parental intent because she and Taglieri never formed an actual agreement about where the child would be raised. The 6th Circuit adhered to the District Court's use of shared parental intention to assess habitual residence of an infant and upheld the return order finding no clear error in the District Court's assessment of the facts.

Justice Ginsberg delivered the majority decision in the Supreme Court affirming the determination of the child's habitual residence under the Hague Convention is "fact driven" that cannot be resolved on any single fact. The Court rejected Monasky's argument that an actual agreement was required in order to establish shared parental intent. Even if there was no agreement, that single fact was not dispositive on the issue. Rather the determination of a child's *habitual residence depends on the totality of the circumstances and an actual agreement between the parents is not necessary to establish habitual residence*. The Court also settled the question of what the appropriate standard of review of a trial Court's habitual residence determination is. Generally, questions of law are reviewed with no deference to the lower Court and pure questions of fact are viewed with high deference to the lower court. A determination of a child's habitual residence is nearly entirely fact based. Once the trial court determines on the totality of the circumstances, the decision should be judged on appeal by *clear error review* - a standard highly deferential to the factfinder. The circuit judgment was affirmed.

This judgment clearly establishes that in determining where a child is habitually resident for the purpose of the Hague Convention, US Courts must now look at the totality of the

¹⁷ No. 18-935.

circumstances and not just the parental intention. Ginsberg J referred to the fact that what makes the child's residence habitual is "*some degree of integration by the child in a social and family environment*". Ginsberg found that much depends on the unique circumstances of the case and is informed by common sense (Redmond). For older children capable of acclimatising to their surroundings the courts have long recognised that factors indicating climatization will be highly relevant, but because children especially those too young or otherwise unable to acclimatise, depend on their parents as caregivers, the intentions and circumstances of care-giving parents are relevant considerations. No single fact however is dispositive across all cases.

The Court referred to *Beaumont and McEleavy* and to *Anton* in determining the issue. The Court also referred to the views of the Treaty partners and referred to the UK Supreme Court decision in *A -v- A*. The essential factual and individual nature of the enquiry should not be glossed with legal concepts. The Court found that there were no categorical requirements for establishing a child's habitual residence, least of all an actual agreement requirement for infants.

It is noteworthy that in his partial dissent Thomas J. stated that the reasons for interpreting the Convention in this manner was to be found in the text, and that it was dangerous to rely on international jurisprudence as a reason for interpreting habitual residence in this way. Thomas J, referred to the fact that it had taken 30 years for "*foreign courts to coalesce around an interpretation of habitual residence. ...*" This for him demonstrated the risk in relying on foreign judgments rather than a "*fulsome textual analysis*". Would the court have decided the issue differently if it had been asked to decide it in 1990, 2000 or even 2020?

Canada

The important Supreme Court of Canada decision delivered on the 20th of April 2018 in *Office of the Children's Lawyer and John Paul Balev and Catherine Rose Baggott*¹⁸, was an opportunity for the Supreme Court of Canada to look at the issue of habitual residence in the context of a time-limited move from Germany to Ontario. The parties had moved to Germany in 2001, their children were born in 2002 and 2005. The children struggled with school in Germany and the father gave his time-limited consent for the children to move to Canada with the mother for the 2013/2014 school year. The question that arose was where the children were habitually resident prior to their wrongful retention in Ontario. The issue was moot, the children having been returned to Germany and in fact the mother having been permitted to relocate back to Canada with the children by a German Court, but the Supreme Court of Canada took the opportunity to review the international jurisprudence in relation to habitual residence and make a decision as to whether the Court should move from what had hitherto been a "parental intention approach" to a more flexible "child centred approach" in the determination of habitual residence.

The majority judgment was given by McLachlin CJ with five judges concurring and there was a three-member dissent. McLachlin J reviewed international decisions where time limited travel to which the parents had agreed had been found not to change the child's habitual residence, stating that that approach dominated Canadian jurisprudence. In contrast the child-centred approach determines a child's habitual residence by the child's acclimatisation in a given country. The Court then looked at the "hybrid approach" where the judge determining habitual residence looks at all relevant considerations arising from the facts of the case at hand.

¹⁸ 2018 SCC 16.

In reviewing the international judgments on the hybrid approach the Court reviewed the ECJ cases of *Mercredi v. Chaffe* C-497/10 and *OL v. PQ* C-111/17. Under the hybrid approach the Court commented that the circumstances of the parents including their intentions may be important particularly in the case of infants or young children. The Court found that under the hybrid approach that there was no rule that the actions of one parent cannot unilaterally change the habitual residence of the child citing *re R Children* [2015] UKSC 35 and *A v. A* [2013] UKSC 60. The majority found that the hybrid approach should be adopted in Canada for two reasons,

1. The principle of harmonisation supports the hybrid approach.
2. The hybrid approach best conforms to the text, structure, and purpose of the Hague Convention.

The court found that although absolute consensus had not yet emerged, the clear trend was to reject the parental intention approach and to adopt the hybrid approach and referred to recent decisions from the European Union, the United Kingdom, Australia, New Zealand, and the United States. The Court found that the desirability of harmonisation weighed heavily in favour of following the dominant trend in Hague Convention jurisprudence but then looked at the text, structure, and purpose of the Hague Convention in deciding that the hybrid approach best fulfilled the goals of

- Prompt return,
- Deterring parents from abducting the child in an attempt to establish links for the country that may award them custody.
- Encouraging the speedy adjudication of custody or access disputes in the forum of the child's habitual residence.
- Protecting the child from the harmful effects of wrongful removal or retention.

The Court found that the hybrid approach deterred parents from attempting to manipulate the Hague Convention. It discouraged parents from attempting to alter a child's habitual residence by strengthening ties with the particular State for two reasons, because parental intent is a relevant consideration under the hybrid approach and because parents who know that the judge will look at all of the circumstances will be deterred from creating legal and jurisdictional links which are more or less artificial.

The Court contrasted the parental intention approach, saying that it facilitated manipulation of the Hague Convention scheme. It may lead parents to exercise intention in ways that artificially maintained the child's habitual residence in the initial State. It may allow parents to create artificial jurisdictional links by way of an agreement stipulating the parents' shared intent. The parental intention approach leads to detailed and conflicting evidence as to the intention of parents which delays the outcome of Hague proceedings and stated that this was pivotal in the CJEU decision in *OL -v- PQ* (see below)

The Court found that the hybrid approach simply acknowledges that absolute approaches to determining habitual residence under the Hague Convention do not work. The Court then moved on to the question as to whether the hybrid approach of a child's habitual residence can change while he/she is staying with one parent under the time-limited consent of the other. The Court found that a court must avoid treating a time-limited consent agreement as a contract to be enforced by the Court. The agreement may be valuable as evidence of parental intention and parental intention may be relevant to determining habitual residence, but the parents cannot contract out of the Court's duty to make factual determinations of the habitual residence of the children.

The three-person minority had a very different view on the approach to be taken. Cote and Rowe JJ delivered the minority judgment, approving the parental intention approach. The minority found that the father's consent was for a limited time stay only and that the habitual residence could not change because he did not intend that the children were to be resident in Canada for a period of more than one year. The minority considered parental intention to be the most straight forward approach, as in where the parents last mutually intended for the child to be habitually resident. The minority found the approach of the majority to be an unprincipled and open-ended approach- untethered from the text, structure and purpose of the Convention that created a recipe for litigation. The Court, in looking at parental intention, can look to objective evidence of shared parental intent. If there is an agreement in writing that the move to the new jurisdiction is meant to be temporary, then that agreement should be given decisive weight. The Court can look at actions as well as declarations. The minority found that where parental intent was explicit in an agreement then that should be determinative of habitual residence absent exceptional circumstances.

In a case where a purportedly time-limited stay has stretched on for very many years it may not be realistic to say that the parents still intend for the child to be habitually resident in the first jurisdiction. The minority believed that the parental intention approach is mandated by the ordinary meaning of the text and structure of the Convention and the object and purpose of the Convention and policy concerns. It found that Article 12 contained two distinct provisions depending on when the Convention proceedings are initiated. The fact that there was no "settling in" provision when proceedings are initiated within a year is a strong indication that evidence of "settling in" should not play a role in the analysis of habitual residence.

The two-step analysis applied by the Convention differentiated the concept of habitual residence at stage one from evidence regarding the child's circumstances which pertained to some of the discretionary exceptions under Article 13. Article 5 provides that custody rights includes the right to determine on the child's place of residence - thus although the Convention does not directly define habitual residence, it at least envisions that parents by virtue of their custody rights must have some influence over where their child is deemed to be habitually resident.

The minority also found that the purpose of the Convention supports an approach based on parental intention. The defining object of the Convention was the enforcement of custody rights. The object of the Convention is not to determine whether an order returning the child to another country or residing with a particular parent is in the child's best interests. It deals with jurisdiction. If respect for custody rights is the guiding purpose of the Convention, it follows that parental intent should be a centre of focus if not presumptively determinative, in assessing habitual residence. The facts of this case in which the father granted a time-limited consent to his children living in another country offered a prime example of why this must be so. If the children's habitual residence changed to Canada notwithstanding the fact that he did not consent to them living there, then his custody rights are effectively disregarded. Examining habitual residence from the perspective of the parents' last shared mutual intent protected rights of custody and access because it prevents one parent from unilaterally changing a child's habitual residence and thereby preventing the child's return to the left-behind parent.

They considered this to create a comparatively clear and certain law. Absent shared parental intent, neither parent has anything to gain by abducting the child because a child's habitual residence will remain the original country absent exceptional circumstances. The minority looked at the hybrid approach. It said that the cases mandated the Court to look at the location, friends, social networks, the child's living and school arrangements, geographical and family origins, all of these factors require evidence as whether the child is settled into his/her new environment and is not faithful to the text of the Convention. The minority felt that

the hybrid approach stripped the Convention of its deterrent effect- given that parental intent could be outweighed or undercut by the connections the child develops to new jurisdiction. An abducting parent in a most common case who ceases to return a child after a period of consent expires stands to benefit by quickly establishing roots in a new home. The uncertainty generated by this ad hoc approach benefits would-be abductors.

The minority said that there is strong jurisprudential support for the parental intent model. It found that much of the international jurisprudence cited by the majority did not speak to situations where evidence of parental intent was clear. So, for example in *Punther*¹⁹ the parents had agreed to a shuttle agreement. The ongoing nature of a shuttle agreement made the intention of the parents more difficult to ascertain. The minority expressed concerns as to the requirement for judges to look at all relevant matters. What evidence is needed? These concerns multiply as more factors and additional facts providing context for these factors are put forward by litigants.

The minority believed that the effects would be felt most acutely by parents or potential litigants who lack any discernible guidance as to how they should order their family affairs. This is particularly important in the context of educational exchanges, family visits, other forms of international travel where the majority's approach effectively vitiates the purpose of time-limited consents. If a parent can override such an agreement by presenting competing evidence based on all relevant factors, then the certainty provided by time-limited consent agreements is illusory.

Other jurisdictions

In *SK v. KP*²⁰ the New Zealand Court of Appeal on the 24th of February 2005 dealt with issues such as, can a child be left without habitual residence. In that case the child was born in the United States in July 2000 with an American father and a New Zealand mother. They were married and five months after the birth the mother and child went to New Zealand with the father's permission, they returned five months later in 2001. Upon their return the mother fell pregnant again. They returned to New Zealand in November 2001 again with the father's permission. By September 2002, the father realised that the mother did not intend to return and the following month he launched return proceedings. In November 2002, the family court dismissed the father's application finding the older child had no habitual residence at the date of the alleged wrongful retention, ruling that the younger child could never have been habitually resident in Illinois having spent his entire life in New Zealand. The father initiated an appeal in respect only of the older child. It was dismissed by the High Court and he obtained leave to appeal to the Court of Appeal. The Court of Appeal found that the child had no habitual residence on the relevant date.

In *Commonwealth Authority -v- Cavanaugh*²¹ the full court of the Family Court of Australia dealt with a case where the parents and three children lived in Australia but decided in 2014 to live in Finland for a year. They kept their family home, the father retained employment and the children's schooling was deferred. In March 2015 they separated during a visit back to Australia and the father sought to prevent them returning to Finland the trial judge had found that the family had not become habitually resident in Finland, had abandoned their habitual residence in Australia and had no habitual residence.

¹⁹ *P-v- Secretary of State* (decision of the Court of Appeal New Zealand, [2004] 2 NZLR 28 wherein the children moved between Australia and New Zealand.

²⁰ [2005] 2 NZLR 590.

²¹ [2015] FamCAFC 233.

The Court considered the case of *LK* (see paragraph 2.3. above) and stated that *“the finding of an intention or settled purpose is not dispositive of the issue of habitual residence. There is but one finding to be made which is of “habitual residence”, taking into account all relevant matters”*.

The Court found the trial judge gave excessive weight to the lack of a common purpose and “has overtones of a consideration of domicile”. The Court found the children had become habitually resident in Finland.

In the case of *LCYP v JEK*²², the High Court of Hong Kong applied the UK decisions of *A v. A* and *AR v. RN* [2015] UK SC 35. Arguments made on behalf of the left-behind parent that the rationale of the Hague Convention was to ensure the prompt return of the children and that the new approach on habitual residence precluded the rationale of the Hague Convention from being implemented. He stated that this new approach would deter a party from agreeing a temporary removal least it may be used against the left behind parent in deciding the habitual residence of the children. The Court found that parental intent plays a part in establishing or changing the habitual residence of the children. However, it is only one of the relevant factors that had been considered in deciding whether a move from one country to another has a sufficient degree of stability to a change of habitual residence.

The East Caribbean Supreme Court gave judgment the case of the *AG of Saint Christopher & Nevis -v- Skerritt*²³ in respect of two children who had moved from British Columbia to Florida in 2013. In June 2013 the defendant brought the children to St Kitts and refused to let them leave St Kitts. The issue was whether they were habitually resident in Florida or in British Columbia. The court found that the children had become habitually resident in Florida prior to the wrongful retention. The court applied the hybrid test looking at the settled intention of the parties, the children’s carers and the factual circumstances of the children themselves.

Recent cases in the Court of Justice of the European Union

The 2017 judgment of the Court of Justice *OL v. PQ* 24 concerned a child born in Greece who lived with the mother in Greece for the first five months of his life. The argument was that it was intended that the child and mother return to Italy after six months. The Court found that *“if the intention initially expressed by the parents were to be regarded as a consideration of crucial importance, that would transcend the concept of habitual residence and would be contrary to the structure, effectiveness and the objectives of the return procedure.”*

The court found:

- (i) Habitual residence is a question of fact.
- (ii) Having regard to the structure of the 1980 Hague Convention, the argument that the parents jointly exercised rights of custody, and that the mother could not therefore decide alone on the child’s place of residence, cannot be determinative for the purposes of establishing where the child is habitually resident. This is because in the framework of assessing an application for return, the determination of the place where the child was habitually resident precedes the identification of the rights of custody. Consequently, the consent of the father or absence of that consent cannot be a consideration that is decisive. This interpretation, it was stated, was confirmed by Article 10, which envisages a situation where a child acquires a new habitual residence following a wrongful removal.

²² 13th August 2015.

²³ [September 12th 2014.

²⁴ C-111/17.

- (iii) To consider the initial intention of the parents as a factor of crucial importance would be detrimental to the effectiveness of the return procedure and to legal certainty. The application for return must be dealt with expeditiously and therefore must be based on information that is quickly and readily verifiable and, so far as possible, unequivocal.
- (iv) Such an interpretation of the concept of habitual residence would be contrary to the objectives of the return procedure which was the restoration of the status quo ante. Admittedly it was also an objective that one of the parents cannot strengthen his/her position on the issue of custody with respect to a child evading by wrongful act the jurisdiction of the Courts. However, in the present case no evidence was provided to suggest such an intention by the mother.
- (v) The concept of habitual residence must be interpreted according to the best interests of the child. That fundamental consideration does not call for an interpretation such as that proposed by the referring Court. The right of the child to maintain a personal relationship and direct contact with both parents does not require that the child should travel to the Member State where the parents were resident before the child's birth. Moreover, it was consistent with the criteria of proximity that decisions concerning the child are taken by the courts of the Member State in which she has lived continuously since her birth.

The 2018 case of *UD -v- XB*²⁵ was a reference from the UK in respect of a Bangladeshi mother who gave birth in Bangladesh on the 2nd of February 2017. The child had remained in Bangladesh since that time and consequently was never present in the United Kingdom. In January 2018 the father returned to the United Kingdom without the mother. The referring court asked whether Article 8 of Regulation 2201/2003 must be interpreted to the effect that a child must be physically present in a Member State in order to be regarded as habitually resident in that Member State for the purposes of that provision.

The court found as follows: The importance placed by the EU legislature on geographical proximity in order to determine the court which has jurisdiction in matters of parental responsibility is apparent from article 13(1) which bases the jurisdiction of a court on the fact that the child is present. Thus, the court has held that the recognition of a child's habitual residence in a given Member State requires at least that the child has been physically present in that Member State. Physical presence in the Member State in which the child is allegedly integrated is a condition which necessarily must be satisfied before assessing the stability of their presence and habitual residence for the purposes of Regulation 2001/2003 may not be established in a Member State in which the child has never been .

The court went on to say that, in the absence of the child's physical presence in the Member State concerned, it is not possible when interpreting the concept of habitual residence to give greater weight to circumstances such as the intention of the parent who in practice has custody of the child or the possible habitual residence of one or other parent in that Member State at the expense of objective geographical considerations without disregarding the EU legislature's intention. The fact the child concerned is not physically present in the Member State precludes considerations such as those set out in the preceding paragraph of the present judgment from being taken to account - this is more consistent with the criterion of proximity. Article 24 of the Charter of Fundamental rights of the European Union does not require an interpretation that differs, in particular because Member State may, on a residual basis, confer jurisdiction on their courts under their national laws.

In the third judgment of the *CJEU HR -v KO*²⁶(judgment delivered 28th of June 2018) the referring court asked how to interpret the concept of the habitual residence for the purpose

²⁵ C-393/18 judgment given 17th October 2018.

²⁶ C-512/17.

of Article 8 and in particular which elements are to be used to determine the place of habitual residence of an infant in circumstances such as those arising on the facts of that case. The court referred to the criterion of proximity and stated that the case law established that the child's place of habitual residence must be established on the basis of all the circumstances specific to each individual case. In addition to physical presence of the child, other factors must be chosen which are capable of showing that presence is not in any way temporary or intermittent and that reflects some degree of integration of the child into a social and family environment. The court went on to say that the child's place of habitual residence is the place which in practice is the centre of the child's life. Where child is not at school age and a fortiori where the child is an infant, the circumstances of the persons with whom the child lives and by whom the child is in fact looked after and taken care of on a daily basis (as a general rule its parents) are particularly important for determining the place which is the centre of the child's life. In a situation where such an infant lives with its parents on a daily basis, it is necessary in particular to determine the place where the parents are permanently present and are integrated into a social and family environment.

The court went on to say that the intention of the parents to settle with the child in a given Member State, where that intention is manifested by tangible steps may also be taken into account in order to determine the child's place of habitual residence. The court found that stays spent by the child with its parents in the past in the territory of a Member State in the context of holidays are in principle intermittent and temporary interruptions to the everyday lives. Therefore, such days cannot as general rule constitute decisive circumstances in the context of assessing the child's place of habitual residence. The fact that in the present case those stays sometimes lasted for several weeks or even some months does not in itself call into question the relevance of those findings. Against that background the fact that a parent was originally from the Member State and on that basis shared the culture of that State and maintained relationships with the members of her family who are resident in is also not decisive. The court found that a determination of the child's habitual residence requires a global analysis of the particular circumstances of each individual case.

The court particularly distinguished the facts of the *Mercredi* case, stating that at the time that relocation took place Ms Mercredi had sole custody of the child for the purpose of Article 2. At the time the action was brought in the case the mother and daughter been staying on a few days on the island of question it was necessary to determine whether the child's place of residence for the purpose of that regulation was still the United Kingdom, or whether in view of such a geographical location it should move to France. In that context the fact that Ms Mercredi was originally from that island; that her family was still living there and that she spoke French would indicate her permanent relocation .

It is true that the intention of the parents may constitute a relevant factor for determining the place of the child's habitual residence. However, the fact that a child is in the custody of one of his parents does not mean the parental intention can in all cases be summarized as being the wish of that parent alone. Indeed, so long as both parents are entitled to custody of the child and both intend to exercise that right, the wishes of each parent must be taken into account. The determination of the child's place of habitual residence is essentially based on objective circumstances. The intention of the parents is not in principle decisive in itself. In that regard it is merely, where appropriate, an indication capable of complementing a body of other consistent evidence. Accordingly, the wish of the parent who practically has custody of the child to settle with that child in that parent's Member State in the future whether established or not, cannot in itself establish that child's place of habitual residence in that Member State.

Conclusion

It is the writer's opinion that the move away from the parental intent approach has meant a loss of clarity in the context of time limited moves. Whereas it was always the case that, even in a time limited move, if the period of time involved was so long that the children put down roots in a new jurisdiction, then habitual residence would thereby change. In the context of shorter periods of time, parents could rely on agreements, sometimes ones which had been approved by the Court, allowing children to reside in another jurisdiction for a certain period of time.

In the case of *Re M Children*²⁷ Lord Justice Moylan in the Court of Appeal referred to the number of judgments of the higher courts on the issues of habitual residence, stating that *"there is clearly a risk that the number of decisions available to be deployed by the parties might itself distract the court from the essential factual enquiry..... The situations being considered by the Court will vary enormously so general observations have to be applied with care"*

It would appear that there are an increasing number of child abduction cases where the issue of habitual residence is now raised as a defence. Increasingly practitioners are finding it difficult to advise as to whether the facts will prove that habitual residence has or has not changed. This reduces the opportunities for out of court settlement and for speedy resolution of such cases. This leads to greater litigation and less opportunity to resolve cases.

Referring specifically to the *Balev* decision, the minority found sufficient textual and policy reasons to justify the application of the parental intent approach in determining habitual residence. Further debate, discussion and critical analysis is necessary going forward to allow a conclusion as to whether or not the global jurisprudential development is to be welcomed.

This paper was delivered in January 2021 to the Four Jurisdictions Conference.

²⁷ [2020] EWCA Civ 1105.

THE STATUTORY CHARGE

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Legal aid is the provision of assistance to individuals within society who are unable to afford legal representation and access to the Court system. It is regarded as central in providing access to justice by ensuring equality before the law, the right to legal representation and the right to a fair trial.

In the financial year 2020-21 the spend on Legal Aid in Northern Ireland was £75.3 million and fell into two distinct categories:-

- Civil Legal Aid
- Criminal Legal Aid

Civil Legal Aid (which includes cases involving Family and Matrimonial Law) cost approximately £41.4 million (55%) of the budget. However it is not always free to its recipients. There are two main situations in which a client may have to pay some or all of the costs associated with their case:

1. A client may have to pay a contribution towards legal aid based on their income and any savings or other capital which they may have.
2. If, at the end of the case, a client “recovers or preserves property”, as a result of their Solicitor’s work, they may have to pay some or all of the costs of their case. This is called the “Statutory Charge” and it arises most often in the context of Divorce and Ancillary Relief Proceedings.

What exactly is the “Statutory Charge”?

“As every successful legally aided litigant soon learns, [the charge] is the statutory provision which transforms an out-and-out grant into a mere loan repayable out of any property recovered or preserved in the proceedings”

- *Watkinson v Legal Aid Board* [1991] WLR 419

The Legal Services Agency Northern Ireland (the Agency) (formerly the Northern Ireland Legal Services Commission) is required by law to recover what it has spent on a case whereby someone has kept or gained money or property and some or all of the costs are not met by the Opponent. The Statutory Charge is essentially a term given to the recoupment of money which has been spent by the Agency.

Where a Legal Aid Certificate was granted prior to 1st April 2015, the provisions relating to the operation of the Statutory Charge were contained within Article 12(5) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 and Regulation 17(1) - (8), (9), (9A) and 9(B) of the Legal Aid (General) Regulations (Northern Ireland) 1965. Where a Legal Aid Certificate was granted on or after 1st April 2015, the present and relevant primary legislation in relation to the Charge is contained within Article 17 of the Access to Justice (Northern Ireland) Order 2003 and the Civil Legal Services (Statutory Charge) Regulations (Northern Ireland) 2015.

There has been an ever changing trajectory from 2010 until present day in respect of the Statutory Charge. The Agency “restated” the Charge in 2010 and it became effective for

Legal Aid Certificates granted on or after 1st April 2010. The restatement in 2010 updated obsolete legislative references contained within Regulation 17 (9)(a) and (f) of the Legal Aid (General) Regulations (Northern Ireland) 1965. The significant change brought about by the restatement, was the clarification that the recovery or preservation of property under Article 26 of the Matrimonial Causes (Northern Ireland) Order 1978 was not exempt from the Statutory Charge under the Regulations.

The process of restating the charge was threefold:

- Phase 1 - a partial “restatement” - 1st April 2010 to 10th December 2012;
- Phase 2 - substantive amendments to the Regulations - 10th December 2012 to April 2015;
- Phase 3 - the complete replacement of Regulation 17 with new Regulations being introduced under “The Civil Legal Services (Statutory Charge) Regulations (Northern Ireland) 2015.

A reform of the Legal Aid Statutory Charge legislation resulted in Legal Aid now being considered as a loan and not a gift. The restatement of the Charge clarified that recovery, retention or preservation of property was no longer exempt from the Charge. Practically, if a client has had the benefit of a Civil Legal Aid Certificate and they retain or preserve property, they will fall foul of the Charge and have to repay their costs to the Agency less any contributions made.

The imposition of the Statutory Charge - When does it apply?

To define whether the Statutory Charge applies four questions must be asked (*Hanlon v The Law Society* [1981] AC 124):

1. What are the ‘proceedings’
The starting point for definition of the extent of the charge is: what is the scope of the legal aid certificate (i.e. the proceedings which it covers). The scope of a legal aid certificate is akin to the Solicitors’ retainer for work to be done for a client.
2. What is ‘the property’?
‘Property’ is any property or money which was in issue between the parties in the proceedings
3. Was the property in issue in the proceedings?
Whether the charge applies to particular property turns on whether or not it was in issue in the proceedings for which the certificate was granted (*Watkinson v Legal Aid Board* [1991] 1 WLR 419; [1991] 2 FLR 26 CA). ‘What has been in issue is to be collected as a matter of fact from pleadings, evidence, judgment and/or Order’ (as per Lord Simon in *Hanlon v Law Society* [1981] AC 124).
4. Was the property ‘recovered or preserved’?
If, as a result of receiving legal aid, a client gains some money or property that they did not own before, or if they manage to retain some money that someone tried to take from them, this is called recovering or preserving property and such money or property can be subject to the Statutory Charge. Property is only ‘recovered or preserved’ if it is in issue. Property is recovered if a person takes proceedings to convert it to his own use e.g. a property adjustment order (*Curling v Law Society* [1985] FLR 831 CA); property is preserved if a person successfully resists a claim to his property e.g. an order for sale (*Parkes v Legal Aid Board* [1997] 1 FLR 77, CA).

In the context of Divorce and Ancillary Relief matters, the Court often has to determine how to divide property, endowment policies, pensions and shares or an individual may be seeking a lump sum from their respective spouse. Through the process of restating, the applicability of the Statutory Charge in relation to money and/or property has become a confusing topic for many lawyers.

The Timeline of the Statutory Charge

1. Phase one Partial Restatement from 1st April 2010 to 10th December 2012:

The exemptions to the Statutory Charge were listed within Regulation 17(9) of the Legal Aid (General) Regulations (Northern Ireland) Order 1965 and included cash lump sums, Pension Sharing Orders, maintenance, Pension Attachment Orders (Article 25(1)(c), 26A, 27B and 27C of the Matrimonial Cause (Northern Ireland) Order 1978.

Example 1 of Phase 1:

- Mrs Law has the benefit of a Legal Aid Certificate dated May 2010 and Ancillary Relief proceedings have issued.
- There is one asset, namely the matrimonial home which is in joint names and there are no children of the family.
- An Agreement has been reached that the house is to be sold and the proceeds of the sale to be divided equally between the parties.
- Mrs Law receiving a cash lump sum.
- By virtue of Article 25(1)(c) of the Matrimonial Causes (Northern Ireland) Order 1978 the cash lump sum is exempt from the Statutory Charge.

2. Phase two of the Restatement from 10th December 2012 to 1st April 2015:

Substantive amendments were made to the Regulations with exemptions to the Charge being listed within the Legal Aid (General) (Amendment) Regulations (Northern Ireland) 2012. The main impact of the amendments was the removal of the exemption of cash lump sums from the Statutory Charge. However, under Regulation 17(9)(f) of the Regulations, the first £3000 of any money or the value of any property recovered would be exempt from the Charge. Phase two of the Restatement also contained a provision in relation to the Married Women's Property Act 1882, in that where a certificate relates to a matrimonial cause and an application under Section 17 of the Married Women's Property Act 1882 is made in that case, the application can be treated as a separate proceeding for the purposes of Article 12(5) of the Order.

Example 1 of Phase 2:

- Mrs Law has the benefit of a Civil Legal Aid Certificate dated 1st January 2013.
- Ancillary Relief Proceedings have issued
- One asset is the matrimonial home which is held in joint names and there are no children of the family
- An agreement is reached that the house is to be sold and the proceeds of sale are to be split on a 50/50 basis
- Mrs Law receives a cash lump sum
- The case lump sum is not exempt save for the first £3000 under the enactments listed.

3. Phase three of the Restatement from 1st April 2015 onwards:

The final restatement involved a complete replacement of Regulation 17 of the Legal Aid (General) Regulations (Northern Ireland) 1965. The Civil Legal Services (Statutory Charge) Regulations (Northern Ireland) 2015 are stand-alone Regulations in respect of the Charge however they are complex and convoluted.

Despite the complexity of the 2015 Regulations, there are still exemptions to the applicability of the Charge, namely:

- Periodical payments of maintenance
- Pension arrangements
- Interim Orders under the Inheritance (Provision for Family and Dependants) (Northern Ireland) Order 1979
- Any sums to be paid under the Family Homes and Domestic Violence (Northern Ireland) Order 1998
- One half of any redundancy payment within the meaning of Part 12 of the Employment Rights (Northern Ireland) Order 1996;
- The first £3000 of any money or property recovered
- A client's personal clothing or household furniture or tools and equipment of their trade except where it is considered that there are exceptional circumstances, having regard to the particular value or quantity of items concerned.

How is the Statutory Charge calculated?

The Agency will not be able to determine whether or not the Statutory Charge will apply in any case until the case has settled or resolved and the Solicitor has reported on the recovery or preservation of money or property with reference to any statutory provision which provides an exemption where appropriate.

The Agency or the Taxing Master will assess the Solicitor's Bill of Costs at the conclusion of a case to ensure that the bill is fair and equitable given the nature of the case and the amount of work carried out and required. When the Agency has discharged the Solicitor's costs, they will attempt to recoup as much as possible of all money which they have expended from three sources:

- First, from any award of expenses made by the Court against the Opponent or obtained by the Solicitor as part of a negotiated settlement to the case.
- Second, from any contribution which the client has paid to the Agency
- Thirdly, and only as a last resort, from any property a client has gained or preserved.

A client cannot choose to defer payment of their costs if they are in a position to discharge such costs. The Agency will ask numerous questions regarding the client's finances to ascertain if any such deferment is reasonable. Depending on the answers to the questions posed, the Agency may allow the client to delay repayment on the strict condition that they make regular payments towards the debt. A charge will be registered on any property recovered or preserved until such times as the debt owing to the Agency is discharged in full.

By having a charge registered against the property with the Land Registry or Registry of Deeds, it will officially recognise that the Agency has a claim over the property equal to the amount of money owed. Any charge registered to the property will be equal to the amount

of the Solicitor's bill, minus the total of any contributions which the client has made and any costs paid by the Opponent.

The complexity of the application of the Statutory Charge and the ramifications for the client places an onus on the Solicitor, to explain the operation of the Charge to the client when obtaining initial instructions, and prior to applying for Civil Legal Aid. The Solicitor also has a duty to keep the client informed of the accumulating costs, the implications of the accrual of costs, the Statutory Charge as the case progresses and at the conclusion or resolution of the case. Whilst the consideration of the Regulations and possible exemptions can be time consuming, it is not wasted time, as when the Charge is applied there is no right of appeal.

As Ted Hughes famously stated:

"Nothing is free. Everything has to be paid for. For every profit in one thing, payment in some other thing....."

BUSINESS VALUATIONS IN MATRIMONIAL DISPUTES: HAS COVID-19 CHANGED THE APPROACH?

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Cathy McLean, Chartered Accountant, Associate Director at HNH

Over the last 18 months, we have witnessed a material increase in the number of instructions received requiring expert opinion on the value of a company, partnership or family business as part of a matrimonial dispute.

During this period, Covid-19 has continued to be a major issue in establishing a fair value for certain entities and has created inherent difficulties in its interaction with established legal principles such as the ‘no hindsight’ rule when a historic date of valuation is involved.

There have been both winners and losers during the pandemic and valuation techniques have therefore become more scrutinised as expert valuers must now consider the impact from Covid-19. Consequently, expert valuers have therefore been compelled, more so than before, to look to the financial markets in order to obtain real-time trends. Whilst the performance of certain market sectors has been volatile during the pandemic, the evidence cannot be disputed and often provides the best indication of future economic trends.

KEY ISSUES

Prior to Covid-19, expert valuers have tended to follow similar valuation methodologies when valuing an entity. Whilst there will always be a difference in opinion with regards to the intricacies behind the approach, by and large the commonly accepted methodology was always in agreement.

During the last year, we have seen various different issues arise as we attempt to navigate the uncertainties of Covid-19 when putting forward a fair valuation as part of a legal process. The typical ‘rule of thumb’ approaches have had to be re-evaluated in order to address our instructions and fulfil our duty to the court.

Some of the key matters include the following and we explore each in further detail below:

- 1. *Valuing an entity at a date pre-Covid-19 – how does this test the ‘no-hindsight’ rule?***
- 2. *‘EBITDA Multiples’ achieved for pre Covid-19 transactions: Are they still relevant and comparable?***
- 3. *Company forecasts and projections that may have been updated on several occasions throughout the last year: Can this data be relied upon to drive a valuation?***

- 4. *Minority Discount: In circumstances where the court believes that the application of the discount would be contrived and artificial (as outlined in Mr Justice Horner's judgement in the case APD v RD¹), minority discount is often not applied to minority shareholdings in matrimonial disputes. With many people having to change the direction of their working life and businesses changing structure as a result of the pandemic, should a minority discount be included or at least considered as part of a valuation?***

NO HINDSIGHT RULE

We are often instructed to value an entity in which one or both parties hold a shareholding at various different dates. For example, the business asset may need to be valued at the date of separation and compared with the valuation at the date of trial.

When it comes to valuing a business at a historical date, the prima facie rule is that the benefit of hindsight cannot be applied and only information likely to have been known at that date should be taken into consideration. This could prove a contentious issue when determining the valuation of an entity at the end of 2019 or start of 2020 when it could be argued that the impact of Covid-19 would not meet the test of being 'reasonably foreseeable'.

As such, should the valuation of a business at a point in time just prior to the pandemic – such as a family restaurant which may have closed for several months during 2020 if not permanently – reflect an adjustment for the impact of Covid-19 or not? At what date could it reasonably be assumed that a business within a particular sector would have begun to consider the impact of Covid-19 prior to the national lockdown in March 2020? For example, press reports were already signalling a potential crisis for the travel industry in early February 2020.

Specific accounting practices may be drawn upon to tackle this issue and the expert valuer may seek to use the evidence available from the markets or financial reports at the relevant date in order to provide an indication as to how a particular sector was performing. However, ultimately, the answer to this will likely come from a combination of a legal argument, case law and expert evidence thus highlighting the importance of fact sharing between the client, the legal team and the appointed expert.

The instructions to the expert will therefore be key with respect to this process and should specify whether there is a specific basis (or bases) on which the valuation should be prepared in light of the impact of Covid-19 and the legal argument that will likely ensue. In turn, the expert must make clear to the Court within their report how they have prepared the valuation and the rationale with respect to how they have reached their conclusion.

EBITDA MULTIPLES – THE BENEFIT OF DATA POST COVID-19

When applying the 'Market Approach methodology (i.e. calculating a normalised EBITDA and multiplying this by an appropriate multiple), comparable transactions are used to determine the financial metrics required to value a company. In its simplest form, the choice of multiple within the "Market Approach" method of valuation reflects how many years of current profit levels it will take to generate the equivalent of the purchase investment on a straight line basis i.e. recoup the purchase price.

¹ [2013] NIFam7

Multiples achieved in deals recorded prior to the pandemic may therefore be required to be viewed under a different context. The valuer must ask whether these metrics would still be achievable post pandemic. The best way to consider the position is to look to the markets and how trading entities within the relevant industries are performing. Market data for many industries will have shown a dip in share prices immediately post March 2020 however the key question is how they have responded in the period since this date.

There are of course many deals that have occurred in the period post March 2020. Often, the financial metrics are not immediately available to the public and as such it may take over a year to access this data. At HNH, we have transacted 16 deals in the first half of 2021 across NI and Scotland (<https://hnhgroup.co.uk/uk-roi-h1-ma-league-tables>) and as such, whilst in many instances we cannot always disclose the detail behind these deals, the knowledge helps drive our understanding of certain markets and ultimate multiple choice.

FORECASTS

In addition to historical performance, it is often useful to assess budgets and projections in order to understand the anticipated future outlook for a business. In particular, start-up businesses or those entities that remain in their infancy do not have enough meaningful, historical data to apply the Market Approach and must therefore look to the Discounted Cash Flow Approach. Discounted cash flows, which rely on budgets and forecasts prepared by management, can often be unreliable but have most confidence when utilised for large, stable businesses with high quality financial information available.

Projections, in their nature, are subjective and cannot be determined with certainty. This was demonstrated following the first lockdown in March 2020. Many companies prepared several iterations of budgets throughout 2020. Companies then began to revise their budgets at the end of 2020 with a more favourable outlook in light of the Covid vaccine rollout, removal of restrictions and provision of significant, ongoing support from the Government. As such, we must therefore consider when the projections were prepared and whether they are sufficiently robust to be included within a valuation process.

MINORITY DISCOUNT

In the matter of *APD v RD*, the court was asked to decide whether a minority shareholding should be valued at a discount. The judgement from Mr Justice Horner relied upon the facts regarding the shareholder and outlined that *'there is no conceivable risk of the respondent selling his minority interest in the short to medium term.....Accordingly there is no realistic prospect of the respondent receiving a consideration for those shares which will include a discount to reflect those shares' value on the market'*. Mr Justice Horner concluded that the minority shareholding should not be valued at a discount but also concluded that *'in circumstances where, for example, a minority shareholder will have to place his shares on the open market to fund the divorce settlement, then it will not be artificial or contrived to discount the value of his shareholding'*.

The application of a minority discount is ultimately a matter for the court, and the valuer will take instruction as to whether or not they should provide a valuation which applies a discount. However, the key issue that a valuer should take away from this judgement is understanding that the court will consider a valuation that reflects the reality of the circumstances in which the divorcing spouses find themselves. It is therefore of vital importance that the appointed expert understands the position of the relevant shareholder and the corresponding entity

in a post-Covid world in order to provide a report that sets out the position clearly and aids the court in this decision.

A recent report carried out by the National Centre for Family Business at Dublin City University surveyed family businesses in both the Republic of Ireland and Northern Ireland. The findings of the report outlined that key concerns for family businesses' CEOs included insufficient cash flow and the possible loss of family control of the business. 98% of CEOs reported that the pandemic will change their business model going forward. As such, some entities may find themselves with a requirement to relinquish some control in place of private equity funding. This may be seen as a more realistic prospect whenever the Covid-19 Government support begins to end.

CONCLUSION

Understanding the impact of Covid-19 on business valuations and shareholders is complex and ever-changing. There is no doubt that the pandemic has changed various aspects to the well-established valuation methodologies. In order to present a valuation that is fair and reflects reality requires a detailed understanding not only of the numbers, but all facts in respect of the entity and the market in which it operates. Market research is key to this exercise but must be considered in the appropriate context. Representations from company management are important but must be scrutinised in greater detail than ever before.

Most importantly, fact sharing between the client, the legal team and the appointed expert is fundamental to ensuring that a valuation takes into account all aspects of the business at each of the relevant valuation dates. From our perspective as expert witnesses, the courts will expect the best guidance available and the challenge will be in assessing between the divergence in opinion between valuers. We can best support the court in an attempt to narrow this gap by removing as much as possible the additional subjectivity that follows from a valuation post Covid-19 and replacing it with as much factual evidence as possible.

DOMESTIC ABUSE & CIVIL PROCEEDINGS ACT (NI) 2021¹**Sandra Wylie, Solicitor²**

It was widely anticipated that the introduction of Covid-19 lockdown measures would lead to an increased risk of domestic abuse as people were forced to spend more time at home together. Figures released by PSNI Statistics Branch on 19th November 2021 show that in the twelve months from 1st October 2020 to 30th September 2021 there were 31,470 domestic abuse incidents recorded including 19,036 domestic abuse crimes. The number of domestic abuse crimes rose to 20,260, an increase of 1,312 (6.9 per cent) on the previous 12 months and the highest 12-month period recorded since 2004/05.

Within those crime figures, there were eight murders with domestic abuse motivation. Against this background the introduction of legislation to tackle domestic abuse was long overdue.

On 1st March 2021 the Domestic Abuse & Civil Proceedings Act (NI) 2021 received Royal Assent and it is expected to come into operation later this year. The Act creates a new criminal offence of domestic abuse for Northern Ireland. We have lagged behind the rest of the UK and Ireland in our domestic abuse legislation until now. Controlling or coercive behaviour in an intimate or family relationship has been a crime in England and Wales since 2015 under Section 76 the Serious Crime Act 2015. In the Republic of Ireland the Domestic Violence Act 2018 became law on 1st January 2020 and the provisions of that Act made coercive control or psychological abuse in a relationship a criminal offence. In the absence of a specific criminal offence of domestic abuse in N.I. domestic violence incidents had to be prosecuted under general criminal law. Prior to the collapse of the Northern Ireland Assembly in January 2017 the Department of Justice had consulted on whether a specific offence should be created for Northern Ireland which would encompass patterns of psychological and emotional domestic abuse. The consultation period ran from February to April 2016 and the overwhelming response was that the law needed to be upgraded to recognise domestic abuse in all its forms.

The Act is divided into three parts. Part one deals with the offence of domestic abuse and Section 1 states that it is an offence for a person to engage in a course of behaviour that is abusive of another person with whom they are personally connected and that a reasonable person would consider the course of behaviour to be likely to cause the connected person to suffer physical or psychological harm or is reckless as to whether the course of behaviour causes such harm.

Abusive behaviour is defined in Section 2 as including behaviour that is violent or threatening but also behaviour that has the effect of making the victim dependent on or subordinate to the perpetrator, isolating the victim from friends, family members or other sources of social interaction or support, controlling, regulating or monitoring the victim's day to day activities, depriving the victim of or restricting the victim's freedom of action or making the victim feel frightened, humiliated, degraded, punished or intimidated. The new definition is non-exhaustive and recognises that domestic abuse goes beyond violence. Section 2(4) (a) clarifies that the reference to violent behaviour includes both sexual violence and physical violence.

¹ 2021 Ch 2.

² Brendan Kearney & Co.

A person commits the domestic abuse offence if he or she engages in a course of behaviour that is abusive of the other person with whom they are “personally connected” and if the further conditions set out in Section 1 (2) (a & b) are also satisfied, ie., (a) that a reasonable person would consider the course of behaviour to be likely to cause the victim to suffer physical or psychological harm; and (b) that the perpetrator either intends the course of behaviour to cause the victim to suffer physical or psychological harm or is reckless as to whether the course of behaviour causes the victim to suffer physical or psychological harm. Section 1(3) clarifies that the reference to psychological harm includes fear, alarm and distress. Although the expression “coercive control” does not appear in the legislation, the effects outlined in Section 2(3) capture such behaviour.

The definition of personally connected is set out in Section 5 as

- (a) they are, or have been, married to each other;
- (b) they are, or have been, civil partners of each other;
- (c) they are living together, or have lived together as if spouses of each other;
- (d) they are, or have been, otherwise in an intimate personal relationship with each other,
or
- (e) they are members of the same family.

Section 14 of the Act provides that a person who is found to have committed the domestic abuse offence is liable on summary conviction to imprisonment for a term not exceeding 12 months or a fine up to the statutory maximum of £5000. On indictment, a person found guilty of the domestic abuse offence is liable to imprisonment for a maximum term of 14 years or a fine or both.

The new Act recognises the adverse impact which domestic abuse can have on any children and Section 8 states that the offence will be aggravated and the offender dealt with more seriously when the victim is under 18 years of age. Section 9 states that aggravation will also apply in cases where a child sees, hears or is present during an incident of abuse. Section 9 (3) states that there does not need to be evidence that a child either had any awareness or understanding of the perpetrator’s behaviour or had ever been adversely affected by that behaviour.

Part 2 of the Act outlines provision for civil proceedings. Section 35 amends Article 12A of the Children (NI) Order 1995 to require a court considering an application for a residence or contact order to have regard to any conviction of the person applying for the order for a domestic abuse offence involving the child. Safeguarding measures have also been provided for with Section 36 of the Act prohibiting cross-examination in person of a victim of domestic abuse by a perpetrator. Section 37 states that rules of court must make provision enabling a court to make a special measures direction in family proceedings in relation to a party or a witness who is a victim of or at risk of being subjected to abusive behaviour by another person who is either a party to the proceedings, a relative of a party to the proceedings or a witness in the proceedings.

Clearly the new Act is an important step forward in addressing the issue of domestic violence in Northern Ireland. Ultimately its success will depend on effective implementation. The Department of Justice in conjunction with the Department of Health published its Year 6 Action Plan (2021-2022) for Stopping Domestic and Sexual Violence and Abuse in NI on 29th April 2021. The key actions for this year include launching a multi-media awareness

raising campaign on the new domestic abuse offence later this year, preparatory work to develop legislation on Domestic Abuse Protection Notices and Orders and bringing forward regulations providing for information sharing with pre-schools, schools and colleges of incidents of domestic abuse concerning a child who is a pupil or a student of that education provider in accordance with Section 26 of the Act.

CASE NOTES

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

RE: JAMES, A CHILD: APPOINTMENT AND DISCHARGE OF GUARDIAN AD LITEM, per O'Hara J, delivered 7th February 2020

FACTS/BACKGROUND

This case arose in the context of private law proceedings in relation to residence and contact orders with respect to a 10 year old boy, James. The parties had separated in 2017 and the separation was very acrimonious, characterised by allegation and counter allegation, and leading to James being psychologically damaged. Previous court proceedings concluded in November 2018 whereby James was to have contact with his father on an alternate week basis, three nights in the first week and two nights in the second.

It did not take long until the situation became troubled again and each party applied for a residence order. Due to the acrimony in the case, these applications were transferred to the Family Care Centre, where in early September 2019, the judge ordered that the Trust carry out an investigation pursuant to the provisions of Article 56(1) of the Children (Northern Ireland) 1995.

The judge also appointed a Guardian ad Litem pursuant to Article 60(1).

The Trust's report pursuant to the court's direction under Article 56 outlined how damaged James had been by his parents' inappropriate behaviour and their opinion was that he had suffered significant harm as a result. The report concluded that, "At this time a care order is not necessary to safeguard James and this case can be managed under child protection procedures." The Trust indicated it would continue to work with the family under child protection procedures.

The Judge's direction that a Guardian ad Litem be appointed and provide a report by November 2019 had not been complied with by the Guardian ad Litem agency. They had appointed a solicitor for James, but had not allocated a guardian. Following the receipt of the Trust report, the child's solicitor, instructed by the Agency, applied that the Guardian ad Litem be discharged on the grounds that the Trust was not seeking any public law order and made the suggestion to the Family Care Centre that the Official Solicitor be appointed for the child. That court refused the application to discharge the GAL and made a further order that a report be provided by the GAL. When the matter came before the court again in November 2020, the Agency still had not complied with the court's direction to appoint a GAL. The Family Care Centre was informed by the child's solicitor that the Agency had a backlog of some 30 cases and thus had adopted a policy not to allocate a GAL in Article 56 cases until receipt of the Trust's report.

The case was transferred to the High Court for ruling due to the general importance of this issue in proceedings involving the welfare of children.

HELD

The court declined to discharge the GAL and directed that a report be submitted by a GAL within six weeks.

REASONING

The Guardian ad Litem Agency were represented by counsel at the hearing in the High Court.

They wished the court to approve a policy of not allocating a GAL in Article 56 proceedings until the Trust's report was available **and** if that report indicated that the Trust was not seeking a public law order, the GAL should be discharged, appointing the Official Solicitor instead.

The Agency relied on the provisions of the Children Order Advisory Committee Best Practice Guidance which states at paragraph 3.8.4:

- “(i) If an interim care or supervision order is made when directing an Article 56(1) investigation, it is more likely that the court will determine that the immediate appointment of a guardian ad litem would be appropriate
- (ii) In those cases where the court is considering making an order it is more likely that a guardian ad litem will not be appointed and the court will await the outcome of the Article 56 investigation.”

The advice reads at paragraph 3.8.9, “In the event that the proceedings cease to be ‘specified’ and revert to private law proceedings it may be that the court is of the view that there is a continuing need for the child’s interests to be represented. Consideration should be given to the appointment of the Official Solicitor to act on the child’s behalf and transfer, if appropriate to the Family Care Centre or High Court.”

In the present case, the Agency sought that the GAL be discharged.

The father’s representative, with whom the other parties in the case concurred, argued that the Agency’s policy was wrong in general and in the present case.

She relied on the plain wording of Article 60(1) of the Children Order which reads:

“For the purposes of any specified proceedings, the court shall appoint a Guardian ad Litem for the child concerned unless satisfied that it is not necessary to do so in order to safeguard his interest.”

Specified proceedings include private law proceedings for residence orders where the court has directed that a Trust carry out an investigation under Article 56 of the Children Order.

In the present instance the Trust had not recommended a public law order “at this time”. However, that remained subject to review and a possibility during the course of the private law proceedings. Here, the court had not had the benefit of a GAL’s opinion in order to help make the decision about whether public law orders were appropriate and thus the proceedings remained specified ones.

In carrying out an investigation under Article 56, the Trust had not only to consider whether a public law order should be made, but also was required to consider whether other services or assistance could be provided for the child or family.

Other of the representatives indicated that if the Agency’s submissions were correct, it was effectively the Trust who would decide whether a Guardian ad Litem would be appointed in Article 56 cases. The expertise and knowledge of the Guardian ad Litem and Official Solicitor were different and solicitors do not have social work expertise.

Overall, the court preferred the arguments advanced by the other parties in the case to those of the Agency.

The Children Order Advisory Committee guidance was ultimately solely guidance and it was to statute that the court must primarily look.

In the present climate the court considered that hearing the child's voice in court proceedings is of utmost importance and that the effective and most common way of hearing that was through the GAL. GALs may take a different view to that of the Trust and suggest services or assistance that the Trust or other parties have not previously considered.

The court suggested an amendment of the COAC's guidance at paragraph 3.8.4 as follows:

"In those cases where the court is considering the making an order, it may consider whether to defer the appointment of a guardian ad litem until it receives the report of the Trust's Article 56 investigation if it is of the view that the immediate appointment of a guardian ad litem is not necessary."

In the present case, the Court declined to discharge the GAL appointment and ordered that they file a report within six weeks.

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

ON APPEAL FROM THE MASTER

BETWEEN P, (Plaintiff/Appellant) and P, (Respondent), per O'Hara J, delivered 7th February 2020

FACTS

The case concerned an appeal by the wife from a decision of Master Bell in June 2018 (summarised in a previous edition of the Child and Family Law Update where the background and history of court proceedings were outlined.)

During the course of ancillary relief proceedings which were part heard, the matter was adjourned and the parties entered into a matrimonial agreement and side agreement. The matrimonial agreement dealt with a transfer of the matrimonial home into the husband's name in return for a lump sum paid to the wife on a clean break basis, and maintenance for the child of the family. It was made an order of court by the Master. The side agreement was entered into to protect the wife from criminal investigations for perjury during the course of the part heard ancillary relief and the Master was not made aware of it at the time the matrimonial agreement was made an order of court. Essentially, the wife accepted a somewhat lower lump sum than she might have achieved from the court in return for written assurances from the husband and his representatives (contained in the side agreement) not to report any matters to the relevant authorities concerning the wife's evidence to the court.

Clause 2 of that side agreement read as follows:

"This side agreement is strictly confidential between the parties and their legal advisors and neither party nor their legal advisors nor any other person on their behalf shall be at liberty to disclose the terms of this side agreement to any other third party. Failure to comply with this requirement renders null and void the matrimonial full and final agreement entered into between the parties."

Following the court order, however, the wife refused to sign a transfer deed in relation to the matrimonial home. The husband brought proceedings seeking that the Master sign the deed

of transfer, exercising his powers under section 33 of the Judicature (Northern Ireland) Act 1978. Counsel representing the wife at the section 33 hearing made written submissions and provided a copy of the side agreement to the Master. The wife was relying on Clause 2 to resile from her obligations under the court order, in that now the side agreement had been revealed to a third party (the Master), the matrimonial agreement was null and void.

After hearing submissions from both parties, the Master signed the deed of transfer, rejecting the wife's arguments.

The wife appealed.

HELD

The wife's appeal was dismissed and the Master's decision affirmed.

REASONING

The alleged perjury arose out of evidence given by the wife during the course of the ancillary relief proceedings in connection with medical records which had been amended (it transpired by the GP, but the wife gave a different explanation during the course of the proceedings). The case was adjourned and the wife's representative engaged Senior Counsel to advise her about the risks of her being investigated for perjury. Following that advice the parties entered into a matrimonial and side agreement.

The court heard oral evidence from the wife and her previous solicitor. The judge was satisfied that the sole purpose of the side agreement was to protect the wife from being reported and investigated for perjury. While the wife was not happy with the settlement, she was prepared to settle for peace of mind and also knew her evidence had already damaged her case that marriage had detrimentally impacted on her career. She had had a full week to think over whether she would sign the matrimonial agreement and side agreement and was advised that she did not have to settle her case.

The wife's current representatives submitted that none of the above was relevant and that the only relevant matter was the wording of clause 2 of the side agreement which was , "entirely clear and unambiguous." Once the existence of the side agreement was made known to the Master it rendered the matrimonial agreement null and void.

The court considered case law in relation to the interpretation of contractual provisions. In *Arnold v Britton* (2015) AC 1619, the court confirmed that this "involves identifying what the parties had meant through the eyes of a reasonable reader. Save in the very unusual case that meaning was most obviously to be gleaned from the language of the provision."

However, as per *Wood v Capita Insurance Services Ltd* (2017) UKSC 24 and other cases, "...the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.... The lawyer and the judge, when interpreting any contract, can use them (textualism and contextualism) as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement...."

The court considered that the side agreement was valid and binding, whether or not it had been made an Order of court.

In *Sharland v Sharland (2016) AC 871* the court considered that matrimonial cases are different from other civil cases in that it is the court order which makes the settlement binding on the parties, but that one cannot occur without the other. "...the court cannot make a consent order without the valid consent of the parties....."

The court was of the view that clause 2 of the side agreement could not be looked at in isolation from the rest of the side agreement. When looked at in its entirety, the side agreement was in place at the request of the wife's representatives and in place to protect her from investigation for perjury. The drafting of the particular clause was described by the judge as "imperfect", but it was not a stand alone clause and had to be read along with the rest of the agreement.

The court also confirmed that finality in these cases was important. The case of *Xydhias v Xydhias (1999) 1 FLR 683* is authority for this. If the wife's argument was to be accepted, the agreement could have been opened at any stage in the future.

In addition, the court held that a matrimonial agreement put before the Master and made an order of court could not be put aside by a side agreement of which he was unaware and indeed was purposely not put before him. The wife had had time to consider her position in relation to the matrimonial agreement and side agreement and had proceeded to sign both.

In all the circumstances the wife's appeal was dismissed and the Master's decision confirmed.

In a separate written judgement, the court ordered that the wife pay the husband's legal costs for the appeal, it being "entirely without merit."

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND FAMILY DIVISION

**IN THE MATTER OF THE MATRIMONIAL AND FAMILY PROCEEDINGS (NI) ORDER 1989
BETWEEN MS A, (Applicant) and MS R, (Respondent) and MR P, (Notice Party) and THE
ATTORNEY GENERAL FOR NORTHERN IRELAND, THE SECRETARY OF STATE FOR
HEALTH, THE DEPARTMENT OF FINANCE, (Notice Parties), per O'Hara J, delivered
23rd June 2020**

FACTS/BACKGROUND

Ms A and Ms R, a female same sex couple were in a relationship and agreed with Mr P that he would provide sperm for Ms R to bear a child. They agreed that if a child was born it would be co-parented by Ms A and Ms R. Subsequently, C was born in 2014. Ms R is the only person named on the birth certificate as a parent. Unfortunately, the details of arrangements after the birth, including in relation to Mr P's contact with the child, were not agreed.

At the time of insemination, Ms A and Ms R were in a relationship, but not in a civil partnership or marriage.

Mr P anticipated some contact with C. However, this did not occur and he made an application for a contact order. Ms A and Ms R applied in turn for a joint residence order.

Ms A then issued an application for a declaration of parentage under Article 31B of the Matrimonial and Family Proceedings (NI Order) 1989 to be read compatibly with her rights under the European Convention on Human Rights. A Notice of Devolution Issue and a

Notice of Incompatibility were subsequently issued in connection with the interpretation of Articles 31B and 34 of the 1989 Order and Sections 42 and 43 of the Human Fertilisation and Embryology Act 2008.

Certain matters were agreed by the parties prior to this hearing:

1. Ms R would remain on the birth certificate as C's mother
2. Mr P would not seek to have his name added to the birth certificate
3. C's surname would be the same as Ms A's
4. There would be a joint residence order in favour of Ms R and Ms A under the Children (Northern Ireland) Order 1995

Ms A sought a declaration of parentage on the basis that she should be recognised in law as C's other parent. Ms R supported Ms A's application, but Mr P and all other notice parties were not in support of it.

HELD

The court refused to make a declaration of parentage under Article 31B of the 1989 Order. The court also refused to find that any provision of the 2008 Act is incompatible with Articles 8 or 14 of the European Convention on Human Rights.

REASONING

Ms A argued that to refuse her application for a declaration of parentage would be in breach of her Article 8 and 14 ECHR rights on the basis of discrimination on the grounds of her marital or civil partnership status.

The court considered the provisions of the Human Fertilisation and Embryology Act 2008 which amended previous legislation to extend the categories of people who could be treated in law as the parents of the child.

Section 33 outlines the definition of mother as follows:

"The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child." In the present case, that was Ms R and there was no issue raised in this regard.

Sections 42 to 47 of the 2008 Act provide for the circumstances in which a woman can be treated in law as the parent of a child, described in the legislation as the, "other parent."

1. At the time of the placing in her of the embryo or the sperm and eggs or of her artificial insemination (hereafter "insemination"), the mother was in a civil partnership or marriage with another woman that person was to be treated in law as the other parent unless it could be shown that that person did not consent to the insemination taking place.
2. The insemination took place in the course of treatment provided by a person to whom a licence applies, and agreed female parenthood conditions were complied with by the mother and another woman. These took the form of prescribed forms which would be signed with the full and free consent of both women.

The legislation provides that the consequence of these sections are that, "Where a woman is treated by virtue of section 42 or 43 as a parent of the child, no man is to be treated as the father of the child."

In the present case none of the legislative requirements for Ms A to be treated in law as the other parent were met, or been complied with by Ms A and Ms R.

There were no direct authorities which Ms A could rely on in support of her case, although the court accepted that this did not preclude a finding in her favour.

She relied on the case of *Re P (2008) UKHL 8*. There the applicant could not apply to adopt a child because he and his partner were not married. The court in that instance held that there had been discrimination on the grounds of marital status as the applicant could not even be considered as an adoptive parent.

In the present instance, however, the 2008 Act provided for married couples, couples in civil partnerships, and unmarried couples, who complied with certain prerequisites, to be recognised as the legal parents of a child. The conditions set out in the legislation were ones which Ms A and Ms R could have complied with, but had not.

The court dismissed Ms A's argument that section 42 should be construed as including people in "an enduring relationship". This had been considered in the case of *Re G (Unregulated Artificial Conception) (2014) EWFC 1*, where Jackson J indicated, "I do not regard the existence or non-existence of psychological parenthood as an apt subject for a declaration."

Ms A's Article 8 rights to a private and family life were also considered. The court did accept that these rights were engaged and thus an interference with them had to be justified. In the present case, the interference was justified because the legislation did provide for ways in which Ms A could have become C's legal parent. The fact that she had not availed of them was regarded by the court to be effectively her own fault. The legislation in relation to artificial insemination had been carefully considered and drafted to provide clarity for prospective parents in this complicated area.

In addition, there were orders available under the Children (Northern Ireland) Order 1995 which can be made to give Ms A parental responsibility and shared residence.

In all the circumstances the court dismissed Ms A's application for a declaration of parentage and refused to make a finding that any provision of the 2008 Act was incompatible with the European Convention on Human Rights.

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
FAMILY DIVISION
IN THE MATTER OF AN APPLICATION UNDER THE CHILDREN (NORTHERN IRELAND)
ORDER 1995
AND IN THE MATTER OF AN APPLICATION UNDER THE JUDICATURE (NORTHERN
IRELAND) ORDER 1978
BETWEEN: A MOTHER, (Applicant) and A FATHER, (Respondent)
IN THE MATTER OF FINN (A MINOR) SPECIFIC ISSUE: VACCINATION), per Keegan J,
delivered 30th July 2020**

FACTS/BACKGROUND

The case concerned a four year old boy. His mother and father had been in a relationship for two years, separating when Finn was three months old. Finn resided with his mother following on the separation, but the parties had directly negotiated contact arrangements

for him which included mid-week and weekend contact, including overnight contact. Both parties were involved with the child and interested in his welfare. The mother is now in a relationship with a man who lives in the Isle of Wight. Various applications were before the court. The father had applied for a residence order, a prohibited steps order to prevent the mother taking the child to the Isle of Wight, a specific issue order as regards vaccination and an order for declaratory relief under the inherent jurisdiction of the High Court. The mother had applied for relocation to the Isle of Wight. The only issue before the court on this occasion was the ruling as regards vaccination.

The case had been initially heard by a Master in the High Court who had appointed the Official Solicitor, engaged Social Services and gathered some evidence in relation to vaccination of children in Northern Ireland – correspondence from Dr Michael McBride, CMO for Northern Ireland.

The court also had in front of it, expert evidence in the form of a report from Dr Elliman who has recognised expertise and experience in relation to the issue of vaccination and had given evidence in a number of cases where there was dispute between parents as regards it.

The mother was opposed to Finn being vaccinated whereas the father was seeking that he receive the usual childhood vaccinations. She indicated that the father had initially shared her views that Finn should not receive vaccinations. Her evidence was that she was opposed to vaccination on two main grounds. Firstly, a moral objection to the ingredients contained within various vaccines and secondly, fears that Finn would be adversely affected by the vaccines. During the course of proceedings, she conceded that if Finn were to be in danger, she would consent to a tetanus injection. The father's evidence was that he had reluctantly agreed that Finn not be vaccinated, but had altered his opinion on this. This was particularly so, given an episode when Finn had been hospitalised with bronchitis, and the consultant had asked them about vaccination, indicating that he recommended that this should occur. The mother's evidence was that the father was only changing his mind because she was in a relationship and wanted to relocate to the Isle of Wight with Finn.

HELD

The court made an Article 8 Specific Issue Order that Finn be fully vaccinated.

REASONING

The court took into account the parties' evidence. However, in this regard, "This case is not turning on the particular motivations of either parent, it is turning on what is actually best for the child."

The court also considered the medical evidence in relation to vaccination.

Dr Elliman's report was accepted into evidence without the need for formal proof.

He outlined the two main reasons why vaccination was recommended in the United Kingdom. These are:

1. To protect people from getting a particular disease and suffering its effects
2. If the uptake of vaccinations is sufficiently high, transmission of a particular disease will be interrupted (herd or community immunity.)

He drew reference in his report to the Green Book : Immunisation against infectious disease which applies to Northern Ireland. Importantly, this guidance does not make it compulsory

for parents to have their children immunised but strongly advises that they do so. Under the Guide, parents' wishes are to be respected, even if not in agreement with medical advice. Other countries do make the vaccination of children compulsory.

Dr Elliman also listed in a schedule the list of vaccinations and the timescales recommended. He also outlined in the report the benefits of vaccination and dealt with some arguments advanced in the past regarding these.

In his report, Dr Elliman also had regard to Finn's own medical history and his conclusion was that the benefits of the vaccination programme outweighed any possible side-effects.

Dr McBride's correspondence also confirmed that all vaccination programmes in Northern Ireland are "based on informed consent." He stated, inter alia, "Vaccination will help protect a child against a range of serious and potentially fatal diseases. If a child is not vaccinated, they are at higher risk of catching and becoming very ill from a range of vaccine preventable diseases."

The court then went on to consider the law, beginning with legislation and, in particular, the provisions of the Children (Northern Ireland) Order 1995. There was no issue in this case that both parents had parental responsibility for Finn. The issue here was a dispute about how this should be exercised with regards to Finn's health.

Where there is such a dispute, this can be dealt with by the court by means of a Specific Issue Order under Article 8 of the Children Order. This meant that the paramountcy of Finn's welfare was of first importance and consideration of the welfare checklist was required.

The court then went on to consider case law in this area, the recent case of *Re H (A Child) (Parental Responsibility: Vaccination) (2020) EWCA*, dealt with the issue of vaccinations in the context of public law proceedings, but helpfully outlined a line of cases dealing with the issue in private law proceedings, including, *Re C (Welfare of Child: Immunisation) [2003] EWCA Civ 1148* and *F v F (MMR Vaccine) EWHC 2683 Fam* and *Re B (A Child: Immunisation) (2018) EWHC 56*. In the latter case, the Judge re-iterated that decisions in these types of cases would require an analysis of what was in the best interests of the child concerned in the case. However, "this is now the sixth occasion when the court has had to determine whether a child should be vaccinated in circumstances where a birth parent objects. On each occasion the court has concluded that the child concerned should receive the recommended vaccine...."

In *F v F*, Theis J stated, "in most circumstances (the way parental responsibility is exercised) is negotiated between the parents and their decision put into effect...As neither parent has primacy over the other, the parties have no option but to come to court to seek a resolution when they cannot agree."

The court also took into account the Article 8 human rights of the parties and the child and drew reference to case law in the European Court of Human Rights (although most of this was regarding countries in which vaccination of children is compulsory.) In all these cases the ECHR justified compulsory vaccination because it was aimed at the legitimate purpose of promoting children's health. In the present case the parties and the child had Article 8 rights to private and family law life. The court was able to justify interference with this right as it had the legitimate purpose of the protection of health. Indeed Article 24 of the United Nations Convention on the Rights of the Child is authority that the child has a right to enjoy the highest attainable standard of health.

The court also considered each of the items in the Welfare Checklist.

This was a case where there was a dispute about the exercise of parental responsibility and thus one in which an order under the provision of Article 8 of the Children Order was required.

In all the circumstances the court made a Specific Issue Order that Finn receive his vaccinations.

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
FAMILY DIVISION
IN THE MATTER OF THE ADOPTION (NORTHERN IRELAND) ORDER 1987
AND IN THE MATTER OF ARTICLES 5 BRUSSELS IIa
AND IN THE MATTER OF ARTICLE 37, VIENNA CONVENTION ON CONSULAR
RELATIONS 1963
BETWEEN: A HEALTH AND SOCIAL CARE TRUST, (Applicant), and A MOTHER and A
FATHER, (Respondents)
IN THE MATTER OF J, M R (MINORS) (FREEING FOR ADOPTION: JURISDICTION:
BRUSSELS IIr: VIENNA CONVENTION, per Keegan J, delivered 31st July 2020**

FACTS/ISSUES AT HAND

This issue at hand arose during the course of proceedings by a Trust for orders freeing J, M and R for adoption. It concerned whether the courts in Northern Ireland had jurisdiction to hear the case.

The parents of the children are from Slovakia and are of Slovakian/Roma origin; they had arrived in Northern Ireland in 2012. All the subject children had been born in Northern Ireland. There were six other children of the family, aged between 8 and 24 years. Social Services have been involved with the family since 2012, and there is a history of chronic neglect by the parents of the children.

The court was required to consider whether it had authority to retain jurisdiction of the case by virtue of Brussels IIa and, if not, did it have authority to retain jurisdiction and how. It was also required to consider Article 37 of the Vienna Convention on Consular Relations of 24th April 1963.

HELD

Brussels IIa does not apply to proceedings for freeing for adoption. The court, however, did have jurisdiction to hear the freeing order application by virtue of the provisions of the Adoption (Northern Ireland) Order 1987 itself. In accordance with Article 37 of the Vienna Convention, the court considered that it was appropriate to inform the Slovakian authorities of the freeing order proceedings and to seek any relevant information which would assist the court in its ultimate decision.

REASONING

In considering whether Brussels IIa applied, the court considered the provisions of the Regulation. Article 1(1) states, "This regulation shall apply, whatever the nature of the court or tribunal, in civil matters relating to...
(b) The attribution, exercise, delegation, restriction or termination of parental responsibility."

Article 1.3 of the Regulation limits the scope of the application of Brussels IIa indicating that it does not apply to “Decisions of adoption, measures preparatory to adoption, or the annulment or revocation of adoption.”

The court’s focus was therefore on whether an application to free children for adoption comes within, “measures preparatory to adoption.”

The court considered English case law and, in particular, the case of *Re N (Children) (Adoption: Jurisdiction)* (2015) EWCA Civ 112.

In that case the court distinguished between proceedings for care orders where there was a plan for adoption and placement order proceedings. The first came within the ambit of Brussels IIa, but the second did not. “On the plain language of Article 1(3)(b)...and having regard to the Legarde Report, it is clear that an application for a placement order is a “measure preparatory” to adoption within the meaning of Article 1(3)(b)...it is a precursor to the making in due course of an adoption order....”

In Northern Ireland, placement orders do not exist, however, the Court considered that freeing applications were equivalent to them as children have to be likely to be placed for adoption and in practice freeing applications are usually made once a child has a proposed placement in place.

Given that Brussels IIa did not apply, the court had to consider how to ground jurisdiction. The court had regard to Articles 14 and 15 of the Adoption (Northern Ireland) Order 1987 and the case of *Re A & another (Children) (Adoption: Scottish Children’s Hearing)* (2017) EWHC 1293.

In that case there was a dispute due to the children not being domiciled or habitually resident in the jurisdiction in which adoption orders were being sought. In the present case, however, the children were born in Northern Ireland and have lived here for the entirety of their lives, thus their domicile was not an issue. In the *Re N* case, above, the leading judge stated, “... the fundamental foundation of the jurisdiction of the court to entertain the application for an adoption order is determined...by the domicile or habitual residence, of the adoptive parents and no-one else...”. In the adoption order it is also the domicile of the prospective adoptive parents which is relevant.

The court was also satisfied that there were equivalent provisions in Slovakia which enabled courts to dispense with parental consent to adoption and freeing was thus not a completely alien concept to the mother and father.

In all the circumstances, the court considered it had jurisdiction to go on to deal with the application for orders freeing the children for adoption.

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
FAMILY DIVISION
IN THE MATTER OF THE ADOPTION (NORTHERN IRELAND) ORDER 1987
BETWEEN: A HEALTH AND SOCIAL CARE TRUST, (Applicant) and Ms E and Mr T,
(Respondents)
IN THE MATTER OF J, M, R (MINORS):
(FREEING FOR ADOPTION), per Keegan J, delivered 18th September 2020**

FACTS/BACKGROUND

This case follows on from Keegan J's decision that the Northern Irish courts had jurisdiction to deal with applications by the Trust freeing the children for adoption, summarised above.

There are three children the subject of this application, two girls and a boy, which was to free the children for adoption, seeking to dispense with parental consent to adoption.

A date had been set for the final hearing on 8th September which the mother did not attend and the case was adjourned to allow for her attendance. She did not, in the event, attend on the adjourned date and the court proceeded in her absence and in the absence of the father who had not co-operated throughout the entirety of the proceedings.

There were older children of the family in foster care and, while in Slovakia, the parents had been charged and subsequently convicted of child neglect. The parties came to Northern Ireland in 2012 and Social Services had been involved in their lives since shortly after their arrival. The case was one of chronic serious neglect of the children by their parents, leading to interim care orders; with respect to the youngest child, he was abandoned by the mother shortly after birth. The father has not had contact. The parents did not co-operate with the Trust to effect any improvements to their parenting. The two girls were in one dually approved placement and the boy in a separate dually approved placement. Correspondence from the Slovakian authorities indicated that there were no suitable kinship placements and if the children were to be moved there, they would be placed in institutional care.

HELD

The court dispensed with the consent of each parent and made orders freeing the children for adoption.

REASONING

The factual background was one of chronic parental neglect and lack of co-operation with Social Services and the court proceedings. Given the factual background and its seriousness, the court was able to dispense with the parent's consent. In doing so, the court had regard to the case of *Down and Lisburn Health and Social Services Trust v H (2006) UKHL 36*. There was no prospect of a kinship placement and the children were in very suitable placements which would serve their best interests.

The court had regard to the case of *Re B (A Child) (2013) UKSC 33* which requires the court to consider all other options prior to making such a draconian order. Here there were none.

In all the circumstances the court made orders freeing the children for adoption.

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

**BETWEEN: A FATHER, (Appellant) and A HEALTH AND SOCIAL CARE TRUST,
(Respondent) and A MOTHER and A GREAT AUNT, (Respondents)**

IN THE MATTER OF STEFAN (A MINOR)

**(APPEAL: INTERIM CARE ORDER: IMMEDIATE REMOVAL), per Keegan J, delivered
21st October 2020**

FACTS/BACKGROUND

The case concerned a baby boy who was the subject of an application by the Trust for a care order. The issue at hand for the court was an appeal by the father against a decision of the Family Care Centre of interim removal of the child into care. The Trust's interim care plan was that the child remain in the care of his father and paternal grandparents, on foot of an interim care order, however, the Family Care Centre rejected that plan and made an order for removal into stranger foster care. The father had supported the Trust's interim plan, but the mother, aunt and Guardian ad Litem opposed it.

When Stefan was born the mother and father were presenting as a couple. The mother had had many problems over the years and had had two children freed for adoption recently. The father has two other children who live with their mother and has unsupervised contact with them. The Trust applied for an emergency protection order which was refused, the judge was content that Stefan should live with his mother and maternal aunt. Issues arose concerning that placement over time and the aunt withdrew from the arrangement. She agreed to care for Stefan on a temporary basis while the mother moved out. However further problems ensued. The father's solicitor had been writing to the Trust indicating the father's intention to care for Stefan and in late August 2020 the father arrived at the carer's home for contact and removed the child to his mother's home.

Obviously this removal took place on an unplanned basis. However the Trust carried out a home visit and agreed a plan with the father and his mother for Stefan's care while he remained living with his father. This emphasised the father's mother ensuring the father did not use cannabis. Stefan's paternal grandmother and aunt indicated they would support the father in his care of Stefan. Matters proceeded relatively calmly, save for an incident when the police were called to the home following a disagreement between the father and grandfather. In early September 2020 the Trust held a case conference where they agreed to support the current living arrangements and there would be assessments in relation to each parent. The mother was to have supervised contact with Stefan twice per week for 1.5 hours.

The case came before the court for an interim care order hearing and after hearing evidence, including from the Guardian ad Litem who gave evidence that during her visit Stefan was "jumpy" and there were tensions in the home, and the mother, who raised concern about the father's use of cannabis. the judge made an interim care order removing Stefan into the care of stranger foster parents.

The father appealed on two grounds:

1. That the judge had erred in law by replacing the Trust's interim care plan for the child remaining with his father and replacing it with its own plan for removal into foster care, particularly in the light that no risk of immediate harm had been raised by the applicant Trust.

2. The judge had erred in law in not approving the Trust's care plan and substituting one which was disproportionate, unnecessary and failed to meet the threshold for interim removal of the infant

HELD

The court allowed the father's appeal against the judgment of the Family Care Centre.

REASONING

The court made comment in relation to appeals from interim orders and that these should generally be discouraged. Interim orders are not final orders and are subject to review in ongoing proceedings. However, where a removal of foster care takes place, that can give rise to an appeal.

The appeal proceeded on the basis of a submission of an agreed appeal bundle, written submissions from all counsel and oral submissions as per the authorities of *G v G (1985) FLR 894* and *McG v McG (2002) NI 283*.

The first ground for appeal was a procedural one. Here, the court confirmed that the court is "quite entitled to take a different view of a care plan. In *Hershman and McFarlane: Children Law and Practice*, it is pointed out that the court and Trust share the objective of reaching a solution which is in the child's best interests. Technically here, there should have been an amended care plan which set out arrangements in full, including contact arrangements. However, this ground would not have been sufficient on its own to warrant an appeal.

The second ground was more apposite and was to do with the proportionality of an interim plan of removal.

Articles 6 and 8 of the European Convention on Human Rights are engaged. The court referred to the Northern Ireland case of *X v Y* which summarised the law in *Re B (2013) UKSC 33* "An order compulsorily severing the ties between a child and her parents can only be made if justified by an overriding requirement pertaining to the child's best interest. In other words, the test is one of necessity. Nothing else will do."

The court also drew reference to a recent English Court of Appeal case, *Re C (A Child) Interim Separation (2019) EWCA Civ 1998*, ".....Removal at an interim stage is a particularly sharp interference which is compounded in the case of a baby when removal will affect the formation and development of the parent/child bond..... A plan for immediate separation is therefore only to be sanctioned by a court where the child's physical safety or psychological or emotional welfare demands it and where the length and likely consequences of the separation are a proportionate response to the risks that would arise if it did not occur....."

Hershman and McFarlane also confirm that the preferred course an interim stage is to leave a child were it is with an early hearing date....Ultimately the child's **safety** (my emphasis) must demand immediate separation.

In *Haase v Germany (2004) 2 FLR 39*, is also authority for that, "...imminent danger should be actually established."

The court also had regard to a report from the health visitor who was very positive about the care of Stefan when he was with his father and paternal grandmother.

The court accepted that there were concerns regarding the father, including his behaviour when he had taken Stefan from the maternal aunt's care without prior consultation, while also accepting that he had, through his solicitor, given notice that he wished to assume care of Stefan. The concerns about the father's use of cannabis had been subject of an initial assessment which indicated that the father would not meet the threshold for intervention from Tier 3 addiction services, although some education on the use of cannabis was recommended. The Guardian ad Litem's concerns, while meriting review and assessment were not sufficient to justify immediate removal of Stefan from his father's care, particularly while there were two other adults in the household who could be supportive of his parenting. The father's contact with the mother had also been raised as a concern and no contact between these parties formed part of the safety arrangements entered into between the father and the Trust.

In all the circumstances, the father's appeal was allowed, the court commending the Trust for their actions in managing a difficult case to date.

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

BETWEEN A HEALTH AND SOCIAL CARE TRUST (Applicant) and A MOTHER and A FATHER and A FATHER (Respondents)

IN THE MATTER OF IAN AND JACK (MINORS) ARTICLE 15 BRUSSELS IIR TRANSFER TO THE REPUBLIC OF IRELAND, per Keegan J, delivered 25th November 2020

FACTS/BACKGROUND

The case relates to two children, the elder the child of the first father and the younger the child of the second father. The Trust had brought care order proceedings with respect to both children, who at that time were living with the mother in Northern Ireland. At the time the matter came before the court, however, the children had gone to live in Cavan with their mother, her new partner and their new baby. Social Services in the Republic of Ireland were already involved with the new baby. The two fathers also live in the Republic of Ireland. All parties were born in the Republic of Ireland. There had also been previous proceedings in the Republic of Ireland with respect to the children.

Given the above, the Trust were seeking that the Republic of Ireland courts assume jurisdiction of the case under Article 15 of Regulation (EC) No 2201/2003. The mother did not oppose this request, but the fathers both opposed it on the basis that a transfer of jurisdiction would cause delay in consideration of their applications for contact with their respective children.

HELD

The court acceded to the Trust's request for the Republic of Ireland courts to assume jurisdiction of the case.

REASONING

The case of *Child and Family Agency (CAFA) v JD CJEU Case C-248/15 (2017) 2 WLR 949* is authority that care order proceedings fall within the remit of Article 15.

There is a three pronged test under Article 15:

1. Whether the child has a particular connection with the Republic of Ireland
2. Whether the Republic of Ireland is better placed to hear the case or part of it
3. Whether the transfer of the case would be in the best interests of the children

In the present instance, the court was satisfied that parts 1 and 2 of the test were satisfied on the facts of the case.

The court went on to consider whether the third part of the test was met. The issue of best interests has been developed in case law and the court can take into account the effect of transfer on the children as part of its analysis. Here, the issue was that of delay and whether the children would suffer harm as a result of their not having contact with their respective fathers. The court considered that delay could be a reason for not requesting another court to assume jurisdiction. However, in the present case it was not. Here, there had been opinion sought from experts, who were indicating that further work with the father and wider family was necessary before a final decision and thus there would be no undue delay.

In all the circumstances, the court acceded to the Trust's request for the Republic of Ireland to assume jurisdiction of the court. The courts in the Republic were amenable to the transfer and judicial liaison would take place to ensure a smooth transfer.

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND FAMILY DIVISION

BETWEEN CD, (Appellant/mother) and EF (Respondent/father)

IN THE MATTER OF DON (A CHILD) (APPEAL: SERVICE OF PROCEEDINGS: VOICE OF THE CHILD), per Keegan J, delivered 9th December 2020

BACKGROUND

The case concerned a boy aged 10 at the time of hearing. He lives with his maternal grandparents in Northern Ireland, the mother lives in America and the father is a Turkish national, living in the United Kingdom. The mother and father had met in Turkey, meeting while on holiday. Contact between the father and the boy had been sporadic, mostly indirect, but stopped, the father said, when he started a new relationship. The contact ceased in 2016.

The father moved to the United Kingdom and, as a personal litigant, sought various orders including, a parental responsibility order and contact order. The Family Proceedings Court directed a welfare report and subsequently transferred the case to the Family Care Centre as the mother was not engaging with the proceedings. The Family Care Centre, in September 2020, made a parental responsibility order in favour of the father and an order for contact which was to commence with indirect contact and move to direct contact, to begin in December 2020. No welfare report was carried out for the purpose of this hearing.

The mother appealed the orders on the basis that the case had proceeded in her absence, that she had not been properly served with the papers and that she disagreed with the orders made.

By the time the appeal was heard, the maternal grandparents had made an application for a residence order.

HELD

The court allowed the appeal and remitted the case for re-hearing.

REASONING

The test for appeal comes from *Re B (2013) 2 FLR 1075* and if whether the judge at first instance was “wrong.”

The court considered there were two main questions to deal with:

1. Whether it was appropriate to proceed in the absence of the mother
 2. Whether it was appropriate to make the parental responsibility and contact orders.
-
1. The court had regard to the provisions of the Family Proceedings Rules (Northern Ireland) 1996, including service of proceedings. Rule 4.17 outlines what is required regarding attendance of parties at directions or full hearings and subsection 4 of that Rule outlines when the court can proceed in the absence of the respondent.

“ ..it is proved to the satisfaction of the court that he received reasonable notice of the date of hearing or....the court is satisfied that the circumstances of the case justify proceeding with the hearing.”

In the present case, the Applicant had not adhered to the Rules as regards the service of proceedings, including not submitting an affidavit of service. However, he was a personal litigant and this was a breach of rules, not legislation. In addition, although the Family Care Centre judge did not specifically reference it in his judgment, the appellate Court considered that the judge had been satisfied that the circumstances of the case justified proceeding. Papers had been sent to the maternal grandparents’ home where the child had always lived and still lived.

2. In deciding whether the orders made by the court were appropriate, the court had regard to the fact that no welfare report had been received by the court. This had been tricky for the judge at first instance as it could have appeared that the mother was not engaging in the proceedings. The court had regard to the fact that her parents said they had not opened any correspondence about proceedings, save for the judgment which was the subject of appeal. Effectively the mother could have been evading service of proceedings.

However, more effort could have been made by the court to establish the child’s whereabouts under section 33 of the Family Law Act 1986 and a welfare report could then have been carried out. This was a case where the father had not seen the child for some time and the court order included moving towards direct contact within a relatively short space of time. In those circumstances a welfare report should have been available to the court.

In all the circumstances the mother’s appeal was allowed and the case remitted for a full re-hearing.

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
FAMILY DIVISION
BETWEEN M, (Applicant) and F, (Respondent)
IN THE MATTER OF C (A CHILD) (APPLICATION FOR INTERNATIONAL RELOCATION),
per McFarland J, delivered 8th January 2021**

FACTS/BACKGROUND

The application related to a boy C, aged nearly 13 years old at the time of hearing. He was the child of M and F (mother and father), conceived after a “one-night stand” between the parties. C lived with his mother, but had regular contact with his father, including overnight contact. There had been just one set of previous court proceedings which resulted in a parental responsibility order being made in F’s favour. M subsequently married Y. However in 2018 Y was murdered. This looked like the result of his involvement in criminal activity although M denied any knowledge of Y being involved in such matters. In autumn 2019, M brought C on holiday to a European Union country (EUC). When she did not return with him, F contacted the police. A domestic and subsequently European Arrest Warrant were issued for M’s arrest. She was released, but proceedings issued under the Hague Convention, including an appeal against the original order to return C, resulted in C being returned to Northern Ireland. M has remained in EUC, stating that she has fears about her own and C’s safety due to threats after Y’s death. During the appeal in EUC, M’s representatives had produced a forged Northern Ireland High Court order which purported to confirm that the Northern Irish courts did not claim jurisdiction with respect to C.

There was evidence from Social Services and the Official Solicitor, who had been appointed for C, that he was suffering psychologically as a result of being separated from his mother M and he was isolated in Northern Ireland, refusing to see his father and that family circle as he blames his father for the separation from his mother. As regards the issue of C’s blaming F, the court considered that this blame was misplaced, but nonetheless felt by C and affecting his well-being.

M brought an emergency application seeking the return of C to her care in EUC on an interim basis pending the final hearing of her relocation application.

HELD

M’s application for C to be returned to her in EUC on an interim basis was refused by the court. The court strongly recommended that she return to Northern Ireland to resume care of C pending a final hearing of the case.

REASONING

The court considered the case law concerning international relocation cases and referred to the case of *Re F (A Child) (International Relocation Cases) (2015) EWCA Civ 882* where the court analysed previous cases and commented, “Where there is more than one proposal before the court, a welfare analysis of each proposal will be necessary...an analysis of the welfare factors relating to each option should be undertaken..... a step as significant as the relocation of a child to a foreign jurisdiction where the possibility of a fundamental interference with the relationship between one parent and a child is envisaged requires that the parents’ plans be scrutinised and evaluated by reference to the proportionality of the same....”

The case presently before the court was for interim relief which had been considered in a recent Northern Ireland case, (while that case dealt with interim orders in public law proceedings, the principles regarding interim orders had been helpfully summarised by Keegan J,) In the matter of *Stefan (A minor) (Appeal: Interim Care Order: Immediate Removal (2020) NIFam 22*. Keegan J stated, “An interim order is inevitably made at a stage when the evidence is incomplete. It should therefore only be made in order to regulate matters that cannot await the final hearing and it is not intended to place any party to the proceedings at an advantage or a disadvantage.”

In the present case, C’s welfare was the paramount consideration. It was apparent that he was suffering considerable psychological damage at the present due to the separation from his mother, refusal to attend school in Northern Ireland and refusal to attend contact with his father.

M’s actions in taking C to EUC without the permission of the court and her involvement in the production of the forged High Court Order were relevant factors to consider when deciding whether to return C to EUC on an interim basis. The court indicated that, while it was not appropriate to use this against the mother to punish her, it was significant in establishing whether she could be trusted to return with C for the future final hearing.

While the court did not accept that M’s fears about her own and C’s safety should she return to Northern Ireland were valid ones, it did accept that she might have some fears about her being arrested on return to Northern Ireland for child abduction of C. M, however, had done nothing to allay these fears by, for example, making an approach to solicitors to resolve matters with the PPS.

In addition, the court had very little information before it at present about M’s proposals for C’s residence in EUC, schooling, housing and how he would be supported financially. M’s right to reside in EUC was also not finalised and made more uncertain by the United Kingdom having left the European Union.

The court considered that it would be preferable for C to be re-united with M and his wishes and feelings were evidently that this should occur. However, given that this was an interim application, the overall background and evidence mitigated against a temporary removal of C from the jurisdiction of Northern Ireland to EUC. The court expressed a hope that M would return to Northern Ireland in the period leading up to a final hearing to care for C.

In all the circumstances, M’s application for interim relief was refused.

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
FAMILY DIVISION
IN THE MATTER OF THE HUMAN RIGHTS ACT 1998
BETWEEN SB (A MOTHER), (Applicant) and A HEALTH AND SOCIAL SERVICES TRUST,
(Respondent)
IN THE MATTER OF FLORENCE (A BABY)
CONTACT DURING COVID-19 RESTRICTIONS**

FACTS

The case concerned contact between a mother and a new born baby. Florence was born in June 2020 and two days after her birth was made the subject of an emergency protection

order. There is considerable history in relation to the mother's difficulties in caring for any child. She has four children who all have been freed for adoption and the fact of her removal was not at issue here.

The parties had agreed that the mother should have contact with Florence five times per week. Her issue was that the Trust was not permitting skin to skin contact due to Covid-19 concerns.

The mother made an application to the High Court pursuant to section 7 of the Human Rights Act for direct skin to skin contact. There were, however, ongoing proceedings in the Family Proceedings Court where the District Judge had, on two occasions, refused to make an order in relation to direct skin to skin contact. When the case came before the High Court initially, the judge suggested that advice was sought from the Chief Medical Officer in Northern Ireland, Dr Michael McBride. Following on his advice, the parties were able to agree contact, including skin to skin contact.

The mother was seeking an order for declaratory relief.

HELD

The Court dismissed the mother's application for declaratory relief.

REASONING

The court considered the correspondence from the Chief Medical Officer which stated, "... on consideration of the information provided I believe that while the risk assessment and measures taken may have been proportionate at a point in time it is my professional view that the current requirements and recommendations for avoidance of direct skin contact are now unnecessary and disproportionate....(I am) mindful of the potential negative impact on maternal bonding which is crucially important in these early neo-natal months and that the absence of skin to skin contact between mother and baby may have longer term adverse consequences for both...all risk assessments must be dynamic and subject to regular review in the current circumstances.....)

Two issues had been raised by the Trust in relation to skin to skin contact which were an underlying vulnerability of the foster parent and a concern about the mother's accommodation bringing her into contact with a range of other people. The mother moved to self-contained accommodation and the contact moved to the mother having contact wearing PPE and moving to direct skin to skin contact.

The court considered the law in relation to contact between a mother and young baby. The Trust has an obligation to promote reasonable contact contained in the provisions of Article 52 of the Children (Northern Ireland) Order 1995.

The mother's and child's rights under Article 8 of the European Convention on Human Rights were also engaged. "...there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary ...in the interest of.....for the protection of health or morals..."

The case of *Kroon & Others v The Netherlands (1994) 1994 ECHR 18535/91* was taken into account by the court where it was stated, "...the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities.....regard must be had to the fair balance that has to be struck between the competing interests of the individual

and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.... The State must act in a manner calculate to enable that tie (between a parent and child) to be developed....”

In the present case the court considered that the mother’s Article 8 rights were of vital importance. However these were not unqualified. The Trust was to be afforded that margin of appreciation referred to in the *Kroon* case. There was a global pandemic at the time this was all happening and the Trust acted on the medical advice at the time and changed its position on advice from the Chief Medical Officer. At all times the Trust had involved the mother in its decision making process.

The judge also commented that the issue of skin to skin contact had been raised in the Family Proceedings Court and the decisions of the District Judge had not been appealed by the mother.

In all the circumstances the court considered that the Trust had acted proportionately in very difficult circumstances and accordingly declined to make a declaratory order.

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