

## Family Law – Cross-border contact and residence Disputes

Presentation by Mr. John Meehan, R.M. at the Cross-Border Conference on 3<sup>rd</sup> March 2007

By way of brief preliminary, for the benefit of our Southern colleagues, family courts in Northern Ireland are in 3 tiers; the Family Division of the High Court, Care Centres in the County Court and Family Proceedings Courts in the Magistrates' Courts. The Family Proceedings Court consists of a Resident Magistrate as chairperson, along with 2 Lay Magistrates. According to the quarterly statistics maintained by the Court Service,

- the Family Proceedings Courts handle some 90 to 92% of all Children Order casework, whether matters of public or private law,
- 2 to 4% are handled in Care Centres – the County Court tier, while some
- 6% are handled in the Family Division of the High Court.

In Northern Ireland, our statutory framework is The Children (N.I.) Order 1995 and the Rules thereunder. Applications in respect of residence or contact are provided for within Article 8 and judgments are to be based upon what is known as the paramountcy principle. Thus Article 3 (1) of the Order provides that;

### Child's welfare

Child's welfare to be paramount consideration

3. - (1) Where a court determines any question with respect to-

(a) the upbringing of a child; or

(b) the administration of a child's property or the application of any income arising from it,

the child's welfare shall be the court's paramount consideration.

[..The court must exercise its jurisdiction in accordance with this principle but Art.3 does not enable the court to make an order which it has no jurisdiction to do: *Re D (a child)* [2001] NIJB 163..]\*

Para. (2) of the same Article then lays down another key precept, the No Delay principle;

(2) In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

[..Certainty as to the settled placement of the child should be established as soon as possible: *Re W* [1999] 9 BNIL 40 (Gillen J)..]

Para. (3) delivers the Welfare Checklist;

(3) In the circumstances mentioned in paragraph (4), a court shall have regard in particular to-

- (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- (b) his physical, emotional and educational needs;
- (c) the likely effect on him of any change in his circumstances;
- (d) his age, sex, background and any characteristics of his which the court considers relevant;
- (e) any harm which he has suffered or is at risk of suffering;
- (f) how capable of meeting his needs is each of his parents and any other person in relation to whom the court considers the question to be relevant;
- (g) the range of powers available to the court under this Order in the proceedings in question.

[The court in children proceedings must apply this 'welfare check-list' but in its judgment it need not slavishly aver that the check-list has been applied: *Re SM (Interim Care Orders: Exercise of Judge's Discretion)* [2002] 8 BNIL 36 (NIFam 11, Gillen J). The only relevant characteristics of a 17-month old child are his age, sex and the history of his care so far: *Re W* [1999] 9 BNIL 40 (Gillen J). Where violent or sexual abuse is alleged the proof thereof must be on balance of probabilities and the court then, on the basis of the proven facts, assesses the possibility of future harm: *Re W* [1999] 9 BNIL 40 (Gillen J)..]

Finally, para. (5) delivers the No Order principle;

(5) Where a court is considering whether or not to make one or more orders under this Order with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.

[..See *Re NTB* [1999] NIJB 117 (Girvan J)..]

So, in any application under Article 8 for residence or contact,

- The child's welfare is paramount
- The process of determining what is in the best interests of the child is mapped out by the Welfare checklist
- The court is enjoined to avoid any needless delay in concluding the litigation; and
- No order should result unless it is determined that to make one has positive benefits for the child.

I will be talking from the U.K. perspective. By necessity, I'm going to be explaining how these issues are approached on the northern side of the border. On the broadest brush, I'm sure we all subscribe to some basic and familiar tenets, but I'll be interested to hear whether there are any differences in detail.

To speak of guiding principles in Northern Ireland, in turn, means very much to speak of the principles laid down for the U.K. as a whole, by the English High Court, Court of Appeal and House of Lords. The last-mentioned alone is binding upon our courts, according the strict precepts of precedent, but in practice there is no distinctive position adopted by our High Court or Court of Appeal, as against their English

counterparts, so far as I am aware. That's in respect of common law and matters of statutory interpretation. For statutory material, it is very much the U.K. Parliament which lays down the law. There is a distinct stable of statutory material for Northern Ireland, whether promulgated by the old Stormont parliament or by Orders in Council during direct rule. But these, in fact, are very much based upon London's material and family law is one field in which the distinction between England and Wales and Northern Ireland as separate jurisdictions is perhaps of particularly little significance.

The title given to me for this presentation is cross-border contact and residence disputes. Nonetheless, I don't think one need dwell too long on the matter of contact cases. Cases which involve a cross-border element will, in effect, be litigated in Northern Ireland because the care parent is habitually resident here. Where the absent parent may happen to reside in, say, Cork, that really entails no additional issues for the court in determining his rights to contact. Patently, there is no special difficulty if the absent parent merely seeks to visit the child locally. Even where the application may be to take the child down South for periods of staying contact I don't think the happenstance of an intervening border features large in the calculation. I was recently struck by the fact that, in the case in hand, where the lawyers were arguing at great length over the travel difficulties arising, were mum to be allowed to re-locate down South, that the journey time entailed, one of less than 2 hours, was much the same as if dad had to travel from Belfast to Londonderry. Likewise, I venture to suggest that district judges in the Republic are not going to have any specific concerns by reference to the cross-border aspect in an application by a father, living in Belfast, to come visit his children in Drogheda – not now that the foot and mouth scare has abated, in any event. So, beyond remarking that the paramountcy principle is the chief yardstick in resolving any contact case, border or no, I don't think we need spend much more time on contact.

It's in cases where the care parent seeks to re-locate, or perhaps simply takes flight, across the border that it is more useful to enquire whether that particular line on the map becomes a more dominate feature of the court's approach.

Per Lowe, Everall & Nicholls *International Movement of Children; Law Practice and Procedure* (London, 2004) p. 90

THERE IS NO STATUTORY REQUIREMENT OF CONSENT OR LEAVE OF COURT IN RESPECT OF MOVING A CHILD ANYWHERE WITHIN THE UNITED KINGDOM

Per Re E(Residence: Imposition of Conditions) [1997] 2FLR 638 – Headnote  
On a contested application for residence orders between a mother and a father the judge at first instance found that the mother was the more suitable carer but intended that the father should maintain contact with the children. He decided the issue of with whom the children should live separately from the question of where they should live. He made residence orders in respect of the children in favour of the mother but imposed a requirement under s 11(7) of the Children Act 1989 that the children continue to reside at a named address unless otherwise ordered or agreed by the father. The mother appealed against that requirement.

Held – allowing the appeal – although s 11(7) of the 1989[\*] Act was wide enough to enable courts to make orders with restrictions on residence to

specified places within the UK, a restriction on the right of the carer of the child to choose where to live sat uneasily with the general understanding of a residence order. A general imposition of requirements (subject to exceptional cases) on residence orders was not contemplated by the legislature and where a parent was, as here, an entirely suitable carer, a condition of location of residence was an unwarranted imposition on the right of the parent to choose where he would live within the UK and with whom. The court should consider where children should live as one of the relevant factors where there were cross-applications for residence, but it should not be a separate issue divorced from the question of with whom the children should live. If the case was finely balanced, the proposals of each parent would assume considerable importance. If one parent planned to remove children against their wishes to somewhere less suitable for them, it was an important factor to take into account and might persuade the court to make a residence order in favour of the other parent. The principles in the case-law relating to removing children permanently from the jurisdiction did not apply to requirements under s 11(7) of the 1989 Act.

[\* General principles and supplementary provisions

11. - (1) In proceedings in which any question of making an Article 8 order, or any other question with respect to such an order, arises, the court shall (in the light of any rules made by virtue of subsection (2))-

(a) draw up a timetable with a view to determining the question without delay; and

(b) give such directions as it considers appropriate for the purpose of ensuring, so far as is reasonably practicable, that that timetable is adhered to.

(2) Rules of court may-

(a) specify periods within which specified steps must be taken in relation to proceedings in which such questions arise; and

(b) make other provision with respect to such proceedings for the purpose of ensuring, so far as is reasonably practicable, that such questions are determined without delay.

(3) Where a court has power to make an section 8 order, it may do so at any time during the course of the proceedings in question even though it is not in a position to dispose finally of those proceedings.

(4) Where a residence order is made in favour of two or more persons who do not themselves all live together, the order may specify the periods during which the child is to live in the different households concerned.

(5) Where-

(a) a residence order has been made with respect to a child; and

(b) as a result of the order the child lives, or is to live, with one of two parents who each have parental responsibility for him,

the residence order shall cease to have effect if the parents live together for a continuous period of more than six months.

(6) A contact order which requires the parent with whom a child lives to allow the child to visit, or otherwise have contact with, his other parent shall cease to have effect if the parents live together for a continuous period of more than six months.

(7) An section 8 order may-

(a) contain directions about how it is to be carried into effect;

(b) impose conditions which must be complied with by any person-

- (i) in whose favour the order is made;
  - (ii) who is a parent of the child concerned;
  - (iii) who is not a parent of his but who has parental responsibility for him; or
  - (iv) with whom the child is living;
- and to whom the conditions are expressed to apply;
- (c) be made to have effect for a specified period, or contain provisions which are to have effect for a specified period;
  - (d) make such incidental, supplemental or consequential provision as the court thinks fit.]

**Per Dame Butler-Sloss, P (as she then was);**

Prior to the Children Act, to my knowledge, residence restrictions were not attached to custody orders and only rarely to an order in wardship which did not involve a public law element. An order granting custody to a parent who was to live within the jurisdiction gave the custodial parent the right to decide where to live and with whom. If the plans were unsuitable it might be a reason not to make the custody order in favour of that parent.

These remarks are all with reference to the United Kingdom; on the face of it, they refer equally to a Northern Ireland care parent in regard to her freedom to decide whether to move elsewhere in the U.K., whether to another part of N.I., or to Scotland, or to England & Wales.

In this context, it is to be noted that Art. 13 of our 1995 Children Order is in identical terms to Section 13 of the 1989 Children Act of England & Wales;

‘(1) Where a residence order is in force with respect to a child, no person may

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- (a) cause the child to be known by a new surname; or
- (b) remove him from the United Kingdom;

without either the written consent of every person who has parental responsibility for the child or the leave of the court.’

It is at this point in her judgment in Re E that Dame Butler-Sloss notes;

There is no statutory requirement of consent or leave of the court in respect of moving the child anywhere within the UK.

What then of a practice of granting a free-standing prohibited steps order, forbidding the removal of a child from N.I., where the declared fear is of the care parents plan to move to, say, London?

Does it make a difference if it is accompanied, or joined to, an application for residence?

In other words, is Northern Ireland bordered as much from Great Britain, within the U.K., as it is from Ireland/The Republic of Ireland?

Take the not uncommon situation, then, when an unmarried father, having parental responsibility in respect of the child, by virtue of his name being on the birth certificate, applies ex-parte to a resident magistrate for a prohibited steps order, on the basis that he claims reason to fear that the mother is about to re-locate to elsewhere in the U.K. – say Liverpool. I think most magistrates would grant the order in many instances, as a holding measure, and list the application quickly for an inter partes hearing. I offer the proposition to you that this practice may warrant re-consideration.

It involves considering where the mother is to live with the child, within the U.K., separately from consideration of a residence order, precisely what *Re E* disapproves. Further, where such an application, by way of addressing that defect, or for any other reason, includes an application for a (first) residence order in favour of the applicant, we are clear, I believe, that it is wrong in principle to grant a residence order, concerning movement of the child between parents other than on foot of a full inter partes hearing and with benefit of a Social Work Report. Therefore, it cannot be right, I suggest, to cite the inclusion of a residence application on the papers to contend that one was not making the ex-parte prohibited steps order as a free-standing initiative, just because one intended to address a residence application later. That would be to affront the care parent's liberties without affording her a hearing and on a core aspect of residence rights – the right to decide where to live (within the U.K.).

As against that, lest one is taken to suggest that the law intends a disregard of the 3 separate parts of the U.K. in this respect, mention must be made of section 41 of The Family Law Act 1986, dealing with the habitual residence of a child after removal without consent. To précis, it provides that where a child has been habitually resident in a part of the U.K. (e.g. Northern Ireland) and has been removed from that part without the consent of any person who has the right to determine where he is to reside or in contravention of a court order of that part of the UK, then the child will be deemed to remain habitually resident in that part of the UK (e.g., Northern Ireland) for a period of 1 year following his removal.

This provision relates only to Part 1 of the Act and therefore applies only to non-consensual removals to other parts of the U.K. Any such move must have consent of anyone else having parental responsibility. Therefore it is a very important change that for all children born since October 2002 in the U.K., an unmarried father acquires parental responsibility automatically if his name is entered on the child's birth certificate.<sup>1</sup> That has widened very considerably the range of parents who can seek a prohibited steps order, intended to prevent a removal to another part of the UK without consent.

As stated by Lowe, Everall & Nicholls, p. 91; “The correct approach, therefore, is to look at the issue of where the children will live as one of the relevant factors in the context of cross-applications for residence and not as a separate issue divorced from the question of residence.”

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<sup>1</sup> By the time of settling this text for distribution, I had learnt at conference that no such law exists in the Republic. That has important implications for magistrates dealing with cases involving children born “out of wedlock” in the South, since the proper law for identifying the existence of parental responsibility rights will be that of the Republic of Ireland.

The case of Re S (A Child) (Residence Order: Condition) [2001] 3 FCR 154, provides the one caveat to all this. That was a case of a Down's Syndrome child where the mother proposed to move from Croydon to Cornwall. The expert evidence was that the child would miss out badly on losing contact with the wider family, including the father. Although the father finally did not pursue his application for residence and a prohibited steps order (to prevent that move) the court granted residence to the mother (which she had not sought) but imposed the condition (affirmed in the Court of Appeal by reference to the truly exceptional circumstances) that the child was to continue to reside in the Borough of Croydon unless otherwise ordered.

Of course, one may get to a position where, in effect, one must consider what is tantamount to prohibiting a move within the U.K. via a slightly different route. Let us say that the mother already has a residence order, but the father also already has a defined contact order. Let us suppose that for the mother to move within the U.K. would render the current contact arrangements frustrated. That was the position in Re X and Y (Temporary Relocation within the UK) an unreported judgment in 2005 by Gillen J, who has just completed a distinguished 6-year term as the Senior Family Judge in Northern Ireland. On that account, the mother had applied for variation of the contact order, to allow for her move, with the 2 children, from Belfast to London to pursue an academic course in LSE between October 2005 and June 2006. On appeal from the Master, Gillen J granted the variation of the contact arrangements so as to allow the temporary move.

The Judge also had this to say;

(iii) It is important to appreciate that this is not an application for re-location in the strict sense because it involves moving within the United Kingdom. Consequently the application is simply to vary the contact rights to accommodate a move to England. More importantly, it must also be borne in mind that this application has been presented to me on the basis of a temporary move to England. In the course of her evidence A gave an undertaking to me that she will return the children to Northern Ireland at the end of her LSE course although this will not preclude her mounting a further and separate application thereafter. It is therefore imperative that cases of this kind involving a temporary removal are not to be governed on the same principles as cases where there is a permanent removal of a child from a jurisdiction. The leading case on the latter is of course Payne v Payne [2001] 2 WLR 1826. Indeed even temporary removals from the jurisdiction entirely are not to be governed by Payne v Payne principles. In Re: A (Temporary Removal from Jurisdiction) [2005] 1 FLR 639 Thorpe LJ said at para. 13;

“The more temporary the removal the less regard should be paid to the principles stated in Payne v Payne.”

Let me then bridge over from these issues which fall within a purely U.K. context and over to the subject of this presentation, on the matter of residence and contact issues which involve the border between Northern Ireland and The Republic of Ireland with these words from Dame Butler-Sloss, P in the lead case of Payne v Payne [2001] 1

FLR 1052 – the principles to be used by U.K. courts in considering an application by the care parent to move the children permanently outside that jurisdiction<sup>2</sup>;

(36) But despite the fact that this appeal has raised only the asserted Art 8 rights of the secondary caring parent, we should not lose sight of the Art 8 rights of the primary carer, although not specifically asserted in argument. However an appeal may well arise in which a disappointed applicant will contend that s 13(1)(b) of the Children Act 1989 imposes a disproportionate restriction on a parent's right to determine her place of habitual residence. This right was recognised by the decision of this court in *Re E (Residence: Imposition of Conditions)* [1997] 2 FLR 638 within the confines of the jurisdiction of the court and indeed beyond within the UK. But why should the same right not extend to anywhere within the European Union (having regard to Art 48 of the Treaty of Rome) or, beyond that, within wider Europe? From that point to a right to world-wide mobility seems but a short step. The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 does specifically recognise this right of mobility in Art 2 of Protocol 4 which provides:

- ‘1. Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everybody shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of

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<sup>2</sup> (a) The welfare of the child is always paramount.

(b) There is no presumption created by s 13(1)(b) in favour of the applicant parent.

(c) The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight.

(d) Consequently the proposals have to be scrutinised with care and the court needs to be satisfied that there is a genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end.

(e) The effect upon the applicant parent and the new family of the child of a refusal of leave is very important.

(f) The effect upon the child of the denial of contact with the other parent and in some cases his family is very important.

(g) The opportunity for continuing contact between the child and the parent left behind may be very significant.

public order, for the prevention of crime, for the protection of health and morals, or for the protection of the rights and freedom of others.<sup>3</sup>

(37) Although Protocol 4 has yet to be ratified by the UK, it undoubtedly lends force to the argument that a failure or refusal to recognise a right of mobility beyond the somewhat fortuitous jurisdictional boundary represents a stance of disproportionate parochialism. Although for the purposes of this appeal this paragraph is digressive it does serve to illustrate the generalisation that each member of the fractured family has rights to assert and that in balancing them the court must adhere to the paramountcy of the welfare principle.

Thorpe, LJ had already drawn attention to a pragmatic consideration in cases of re-location;

(28) Furthermore, guidance of this sort is significant in the wider field of international family law. There is a clear interaction between the approach of courts in abduction cases and in relocation cases. If individual jurisdictions adopt a chauvinistic approach to applications to relocate then there is a risk that the parent affected will resort to flight. Conversely, recognition of the respect due to the primary carer's reasonable proposals for relocation encourages applications in place of unilateral removal. Equally as this case demonstrates, a return following a wrongful retention allows a careful appraisal of welfare considerations on a subsequent application to relocate.

How much more, then, would it be unfittingly "parochial" to raise up our mutual border on this island to a factor in itself militating against the re-location of a care parent wishing to move from, say, Belfast to Athlone as apposed to, say, Belfast to Derry? Are the pertinent considerations not exactly the same? After all, consider this from Thorpe, LJ in Re: H (Children Residence Order; Condition) [2001] (That was a case in which a Northern Ireland couple had settled and raised a family in England. After the divorce, the father had care of the children, due to the mother's alcoholism. When the father declared his intention to return to Northern Ireland, the mother responded with an application for a residence order, a prohibited steps order to prevent the removal, and a contact order. [Note, the prohibited steps application was married to one for residence] The father, in turn, applied for a residence order and a specific issue order to enable to the move to take place).

Thorpe, L.J.

[20] What then is the rationalisation for freer movement of the primary carer within the United Kingdom? It seems to me to be obvious. Within the same sovereignty there will be the same system of laws, with the same rights of the citizen, rights for instance to education, health care and statutory benefits. Equally, it can be said that within Europe, whilst perhaps the burden on the applicant may be greater, it is equally mitigated by the fact that within the Community there is the same fundamental approach to social issues and a real endeavour to achieve harmonisation, obviously in social policy but also in family justice. If, moving to the third alternative, the

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<sup>3</sup> Interesting that the stated qualifications do not include "...the interests of juveniles...", in contrast to the right to public trial, enshrined in Article 6 of the Convention.

application is for relocation outside the European region, the necessary adjustment may be rationalised on the basis that the social and other circumstances involved in relocation may require much greater adjustment for the children; alternatively, that the obstacles to contact may be enhanced. However, attempts to rationalise gradation of the hurdles that the applicant must clear are always liable to be tested by specific example, as this case suggests. What is the rationalisation for a different test to be applied to an application to relocate to Belfast, as opposed to, say, an application to relocate from Gloucester to Dublin? All that the court can do is to remember that in each and every case the decision must rest on the paramount principle of child welfare.

On the facts, by the way, the Court granted residence to the father but made an order, prohibiting the removal of the children from England.

In any event, so far as moves from Northern Ireland be concerned, the case law makes very clear that the border itself is of no great moment, I'm glad to say, in private law cases at least, with respect to the precepts applied by the courts in considering whether to grant leave to re-locate.

So, let us go back to that matter of applications for ex-parte prohibited step orders, where, typically, a father seeks, on an emergency basis, to prevent the mother leaving this part of the U.K. with the child or children. I seek to raise the issue as to whether, in our current practice, we take too "chauvinist" an approach where we tend to grant leave to proceed in the absence of the mother and make the prohibited steps order, as a holding measure, when listing the inter partes hearing for an early date. And this, mark you, is despite the fact that one may thereby be throwing over, at no small expense, the settled travel plans of the unsuspecting care parent.

Take what I admit to being an extreme example, of my own design: the unmarried father of a 6-month-old baby comes in. He has received word from a mutual friend that his former partner to a very brief relationship is about to re-locate to Liverpool. Neither parent has made any application to the court before and the father does not seek to challenge the fact that his child is in the mother's care. One is of course in the hands of the applicant at that stage in regard to facts which have yet to be tested, but he may assert that he has no idea as to where exactly she is going to be living. Indeed, that tends to be the norm in my experience. In the same way, the given context may be rather more dramatic; this week, I was told that the young mother had telephoned the applicant and said that she had "met" another man on the internet and was leaving in order to pursue a relationship with him.

I must say that I am resistant to a contention that England contains a black hole into which Ulster children are prone to fall unless carefully monitored by our courts. This is most especially not the case when account is taken of section 33 of the Family Law Act 1986, whereby the court dealing with an Article 8 application (which can cover not only contact or residence but also prohibited steps) may order anyone having knowledge of the whereabouts of a child to disclose it to the court itself. Such orders can be made against named telephone companies, banks, credit card companies, social security offices (in respect of payments of child benefit), social services departments and the like – even against the other parent's solicitor, in which regard legal

professional privilege is overridden<sup>4</sup>. Without more by way of background to a particular case, common sense has it that a mother leaving Northern Ireland does not usually cut off all ties with her former home.

The fundamental issue in any case like this is whether it be contrary to the best interests of the child to leave Northern Ireland, in the care of her mother, for elsewhere in the U.K. There must, I would suggest, be some basis for a concern on the magistrates' part in this respect before a prohibited steps order be granted. It is difficult to find that there is something in the quality of the care being afforded the child if there be no application for residence by the father (though, with cases involving older child, he may add an application for parental responsibility). The more usual basis is a concern for the continuance of the contact between father and child. Well, are we being "chauvinist", or "parochial"? Why should contact issues not be sorted out, if need be, in the other U.K. courts into whose jurisdiction mother and child are moving? After all, case law strongly indicates that we are, sooner or later, going to allow the mother to move with the child anyway, even though this entails a significant reduction in the level of contact which the child has previously enjoyed with dad. And besides: who has not had the case where a startled or vexed mother, having been served with the ex-parte order, turns up on the return date to inform us either that (a) there is no planned move at all, (b) that she is moving, but that reasonable contact proposals (previously not disclosed) have been rejected by the father, or (c) that all she had planned was a short holiday, (whether or not the order has cost her the fares)? The resort to these brutal orders are hardly the way for either parent to promote constructive relations. A part of all this, of course, is my concern about any order granted before hearing the other side of the story. For my own part, I very rarely grant any application for leave to proceed in that way. I have only ever "lost" one family, which did indeed leave, to an address in Scotland of which the father knew. In that particular case, his application for contact is still pending, with a stay of those proceedings being considered these many months on. The father is resistant to the notion that he should now apply to the appropriate Scottish courts. And that illustrates another driver to such applications to keep the child here until contact is either agreed or made the subject of an order: the remaining parent simply finds it more convenient and, absent legal aid, cheaper to have his case heard on his own home ground. In such a situation, the covert motivation is not really that of the child's welfare, but the father's pocket.

Where the application concerns a fear that the mother is about to re-locate to the Republic of Ireland and the father has parental responsibility then one has to have regard to the fact that what is being suggested would constitute an offence under section 1 of The Child Abduction Act 1984 – the taking or sending of a child under 16 out of the U.K. without "the appropriate consent". Just as much as a move to France or America, one involving re-location to the Republic (or, technically, even a visit there) must be considered as inherently more significant than one to elsewhere within the U.K.. When I talk of how the border between us matters little in private law cases, I am referring to the final decision in the case. Conversely, that border makes a big difference when considering whether the court will intervene on an emergency basis, to forbid the move until the matter has been further considered. The absent parent,

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<sup>4</sup> Lowe, Everall and Nicholls (*Op. cit.*), Chp. 11.

typically the father, has an absolute right to be consulted in such cases, an absolute right to require the mother to obtain leave of the court in the absence of his consent.

If I may turn now to public law cases, the existence of the border does, I feel, create more particular concerns for our courts and, indeed, the children. I can think of two cases from my own court to illustrate.

The first involved a travelling community family. Care proceedings had been commenced in my court when the baby was less than one month old, first by way of an emergency protection order. The case ran on for almost exactly one year and until a matter of days before the final hearing. At that point, and in a singular demonstration of the reluctance of many respondent litigants to allow me to decide matters for them, the mother fled the jurisdiction to the Republic, with the child.

Where initially Social Services were inclined to leave matters to the South, it was the child's Guardian Ad Litem who vigorously contended that this would be an abdication of the Trust's responsibilities and persuaded it to seek the return of the child in Hague Convention proceedings in the High Court in Dublin. Meanwhile, the child was made the subject of Care proceedings in a District Court of the Republic, while I transferred the Northern Ireland case to our own High Court. In due course, the parents sought an order from that High Court requesting the Republic of Ireland to assume jurisdiction, or to stay the proceedings in Northern Ireland to the same intent.

In concluding that the child ought to be returned, McLaughlin, J ( Foyle Health & Social Services Trust v Cawley and Cawley [2006] NI Fam 7) relied upon a number of features, including the fact that the mother had initially argued strongly that matters should be decided in Northern Ireland. Sadly, she had previous children taken from her in Care proceedings in the South and had felt that she would get a better hearing, on a fresh start basis, here. Second, the child had been securely based with foster parents all the while and the ultimate plan had been to proceed to adoption by those foster parents. Thirdly, all enquiries and investigations had been completed in Northern Ireland and, reference the No Delay principle, it was fitting that matters be concluded here.

That was an interesting case, then, where the Court determined that a child moved elsewhere in Ireland should be returned to the area in which proceedings were pending, in order to make arrangements for the child's future without artificial punctuation, having regard, above all, to the best interests of the child concerned.<sup>5</sup>

Well, if that was a case of the border not operating as a significant barrier to co-operation with regard to the child's best interests, I remain concerned, ever since, about a case where a child was left in the South after an abduction. It involved Chinese immigrants and their 6-year-old son. Social Services had initiated Care proceedings after clear evidence of physical and emotional abuse. The father was a particularly domineering type (while he was in attendance, he refused even to enter the courtroom on most occasions and, when he did, one was aware of a distinctly

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<sup>5</sup> Only at the conference did I learn that the High Court in Dublin actually declined to have the child returned to Northern Ireland and, I am told, proceedings are continuing there. I understand that this may have turned upon a constitutional point with reference to adoptions which were without the consent of the natural parents.

powerful presence). Reported incidents included him upbraiding Social Services, in front of the child, for having kidnapped the boy. Equally, contact also had to be more tightly regulated for the mother after she had on one occasion, urged her son to apologise to his father for the shame of having occasioned such proceedings. Nonetheless, the mother seemed to gradually take the Trust's concerns on board and, as part of a Plan toward reunification to her as sole carer, there came the point when she was allowed unsupervised contact and liberty to take her son out on a trip. She promptly fled over the border and re-united with the father, who had meanwhile set up a fast food carry-out there.

As to whether to seek return of the child, both Trust and Guardian took the view that the only hope of having these parents co-operate was within the Republic as their chosen domicile and that it was better to leave the decision as to any fresh intervention to the local Health Board there. This was despite the fact that the local Board would not – could not – act on the Northern Ireland dossier, save to take the information into account, but would only initiate proceedings on foot of fresh grounds, if any, established by themselves. I do wonder whether that little boy slipped between the nets.

In any event, for those liable to beat themselves up over whether they made the right decision in every case, some comfort may be had from case law in England (where appeals from magistrates are to the High Court, not the County Court, and do not normally entail a full re-hearing. Appeals from the County Court, in turn, are to the Court of Appeal).

In G v G Lord Frazer of Tullybelton said at page 651d;

“The jurisdiction (of cases concerning the welfare of children) in such cases is one of great difficulty as every judge who has had to exercise it must be aware. The main reason is that in most of these cases there is no right answer. All practicable answers are to some extent unsatisfactory and therefore to some extent wrong, and the best that can be done is to find an answer that is reasonably satisfactory. It is comparatively seldom that the Court of Appeal, even if it would itself have preferred another answer, can say that the judge's decision was wrong, and unless it can say so, it will leave his decision undisturbed. The limited role of the Court of Appeal in such cases was explained by Cumming-Bruce LJ in Clarke-Hunt v Newcombe [1983] 4 FLR 482 where he said at p.486;

‘There was not really a right solution; there were two alternative wrong solutions. The problem of the judge was to appreciate the factors pointing in each direction and to decide which of the two bad solutions was the least dangerous, having regard to the long-term interests of the children, and so he decided the latter. Whether I would have decided it the same way if I had been in the position of the trial judge I do not know. I might have taken the same course as the judge and I might not, but I was never in that situation.’ “

This issue was also considered by Gillen, J in the case of McG v McC (2002) NI Fam 10 – interesting in two respects. First, Mr. Justice Gillen, the Senior Family Judge, spoke of the family courts, as a generic term embracing all 3 tiers here – magistrates, County Court and High Court. Secondly, in contrast to the precept which obtains in

other casework, he disapproved the judgment of his immediate predecessor, Higgins, J, in Homefirst Community Health & Social Services Trust v SA [2001] NIJB 218 and held that an appeal from one family court tier to another did not normally involve a re-hearing. The position in Northern Ireland, he ruled, should be the same as in England and Wales, as governed by G v G [1985] FLR 894, stating;

It is quite clear that in England and Wales on an appeal from a Magistrates Court to the High Court, the appeal is governed by the principles set out in G v G [1985] FLR 894. This case is authority for the proposition that the High Court will not interfere unless the decision was plainly wrong or the magistrates erred in law or in principle. In Re CB (A Minor) (Parental Responsibility Order) [1993] 1 FLR 920 at 924c Waite J said;

“The magistrates are also the primary court of discretion; no appeal can be entertained against any decision they make within the scope of the numerous statutory discretions committed to them by the Children Act 1989, unless such decision can be demonstrated to have been made under a mistake of law, or in disregard of principle, or under a misapprehension of fact, or to have involved taking into account irrelevant matters, or omitting from account matters which ought to have been considered, or to have been plainly wrong – ie outside the generous ambit within which a reasonable disagreement is possible.”

Gillen, J. also remarked elsewhere in his judgment (where he was focussing on the conduct of appeals from the county court to the High Court – i.e. Care Centre to Family Division);

A third reason for adopting the approach in G v G is that the nature of family law proceedings is somewhat different from other proceedings heard in the County Court. This in itself does not justify them being subject to special rules of their own, but it confirms the appropriateness of the approach that I consider ought to be adopted to appeals from a Family Care Centre.

\*passages in red denote quotations from the annotated text of the 1995 Order by Mr. Barry Valentine, B.L.