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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

2000/175

HIGGINS J

Introduction

[1] This is an application by CB for a residence order and a prohibited steps order under Article 8 of the Children (Northern Ireland) Order 1995 in respect of her two half-sisters, XZ and YZ. XZ was born in London in 1987 and YZ was born in Belfast in 1988. Their father is WZ (the respondent). He is a national of the Socialist Republic of Burma, the official name of which since 1989 is the Union of Myanmar, (and which I shall refer to for ease of reference as Burma). Their mother was AB, who died in 2000, in Burma. AB married BB, a Pakistani national, in 1973. They had two children, CB who is 25 years of age and DB. The couple and their children lived in London, Singapore and the USA. They were divorced in the mid-1980s whereupon CB, her mother and brother moved to Belfast. They lived with AB's mother in Belfast. BB lived on in Florida where her brother now resides. After her return to Belfast, AB met the respondent, and a relationship developed between them. He was 28 years of age, and she was six years older. They began to cohabit in 1986. They moved to London where XZ was born. After her birth, her mother moved back to Belfast and into an apartment. CB moved with them. Then YZ was born in Belfast. After YZ was born they moved back to London, but CB remained and attended school in Belfast. In 1990, AB, XZ and YZ and their father moved to Singapore where they remained until 1997. AB and the two girls returned to Northern Ireland every summer for extended holidays and every Christmas for two weeks and sometimes at Easter. However, most of their life was spent in the Far East. CB completed her schooling in Northern Ireland and eventually attended university in England. She was very close to her mother and became very close to her two half-sisters. The respondent built a house in Burma and the family moved there but they also rented an apartment in Singapore where they stayed frequently. He might be in Burma for 10 days a month and when there spent much of his time

on his business. The girls attended school in Burma. In 1995, AB purchased a house in Belfast where she would stay on her visits. She had close family nearby and it has been a home for CB ever since. The respondent claimed that he purchased this property for her. AB was a native of Northern Ireland and a British national with a British passport. The girls also have British passports.

[2] The respondent is now aged 40 years. He has a UK passport as well as a Burmese passport and until 1998 had an Irish passport. He runs several trading companies of which he is the sole owner and carries out extensive business through the Far East and elsewhere. AB was a director of the companies and held one share but drew a monthly salary from one of the companies. His main base appears to be in Singapore. He travels extensively for periods of 10 days at a time and then returns to Singapore or Burma for a similar period of time. His businesses appear to be his life, and he is constantly on the move. He maintains a home in London where he stays frequently. He is an extremely wealthy man and at times a generous one, and AB and the girls, including CB, enjoyed a very high standard of living which he financed. However, he can also be a very overbearing man who likes to be in control. For a period between 1997 and 1999, CB worked for the respondent in Burma and Singapore. He married a lady from Northern Ireland, and they have two children, E and F. He divorced a few years ago and his former wife lives in London.

[3] AB was raised as a Roman Catholic but in recent years did not attend church regularly. The respondent is a Buddhist, and the girls were raised as Buddhists. He claimed that in May 1998, after he was divorced from his wife, he and AB went through a form of religious marriage ceremony in Burma, which was referred to as marriage by custom. Monks came to their home and a Buddhist ritual took place which was followed by lunch for 30 people. No civil marriage ever took place and no documents purporting to show they were married were ever produced. If such a ritual did take place it would appear it was not recognised as a marriage by the Burmese civil authorities. Significantly CB had never heard of this ceremony. I am sure her mother, with whom she was close, would have told her if she had married, even in a religious ceremony. AB continued to use her own name. The respondent said that she was known as Mrs B, but in her business life she was known by her maiden name, but in his club in Singapore as Mrs Z. While they were not married, I am sure they were regarded as a couple and a family.

[4] In recent years the relationship between the respondent and AB was a difficult one. CB described numerous arguments and fights between them. She described her mother as worn out by the stresses and strains of the relationship and by his constant absences. He was never there for her and the children. CB averred that her mother had found out about his relationships with other women. He admitted two affairs. One was with a lady from Oslo which he claimed continued from September 1998 until December 1998. It ended, he claimed, when CB told her mother about it, and she required him to end it. He denied any other affairs. The respondent accepted that the relationship had "its ups and down" but that over 14 years it had been a good relationship. It was common case that CB raised his

infidelities with him in Florida in the summer of 2000 and he told her, quite rightly, that it was none of her business. He told her that he had slept with five women since her mother died, but it meant nothing to him. Later he told her he only said this in a temper. However, I was not impressed with his denials about other relationships and would be satisfied that there were other women in his life. CB averred that her mother was thinking very strongly about leaving him and returning to Belfast with the girls. The respondent also spoke to CB about their difficulties and, on one occasion, said AB was thinking of returning to Belfast.

[5] The respondent said that they moved to Burma because of his business interests. Neither AB nor the children had permanent rights of residence in Burma. AB was permitted to stay on a Business Extended Visa which restricted her right to remain in Burma to ten weeks on each occasion. The children were permitted to stay for the same period as AB's dependents. Thus, they travelled to Singapore quite a lot and returned again to Burma. The respondent claimed that since AB's death they have been permitted to enter Burma as his dependents with indefinite right to remain. He stated that they have a permanent right to residence in Singapore through his standing there. They retained a home there. When the respondent's business interests in Burma did not work out as intended, they decided to move back to Singapore. On 16 March 2000, AB and the children travelled to Singapore. They stayed in an apartment. On 17 March, the girls were registered in a school in Singapore and were due to commence in September 2000. On 20 March, he and AB had an argument. An incident also occurred involving XZ. The respondent averred that when XZ refused to do what he told her and then told him to shut up he pulled her collar and marked her neck. I doubt if this incident was as serious as the alleged throttling, but equally I doubt if it was as minor as he suggests. This was probably out of character for him, though I suspect he can be hot-tempered. AB and the girls were due to return to Burma that day but missed their flights. They did return on 21 March, where CB was to join them for Easter. On 22 March, AB collapsed at their home. She was taken in a car with the children to hospital and died on route with the girls present. This was a very traumatic incident for them. CB arrived at Singapore airport to be met by the respondent who informed her of the death of her mother and together they travelled to Burma. All were in shock at the death of AB at the early age of 46 years. Arrangements were made for the body to be transported to Northern Ireland for burial and CB flew back with the girls. The respondent travelled separately. When the coffin arrived at the family home the respondent wished to open it to say good-bye in accordance with his tradition. The family were unwilling for this to happen due to the lapse of time and the conditions in which the coffin had been kept. Considerable tension was created by this incident. AB was buried after Requiem mass. Shortly after the funeral there was a family conference about what should happen to the girls. According to the respondent, AB's family suggested that the girls and CB should remain in the Belfast property for the girls' peace and quiet and that he should leave. He said he had no intention of leaving the property or leaving the children in Northern Ireland and presented her will to the gathering. He said he promised the children could return during the summer and at Christmas. The respondent then moved to his first wife's apartment and, on

20 April, the respondent, the girls and CB left Northern Ireland and returned to Burma.

[6] AB made a will on 5 November 1995 in which she appointed the respondent as her sole executor and bequeathed all her estate to XZ and YZ in equal shares. CB averred that her mother had told her that she had made another will recently, but this cannot be found. She denied that she was annoyed that the house in Belfast was not left to her.

[7] Understandably the girls were very upset and confused about the situation in which they found themselves. One would expect children of that age to turn to their father for comfort and assistance. That does not appear to have happened. According to CB, a major row took place between XZ and her father during which she said she did not want to live with him. He reportedly said she could stay in Belfast, and he would finance the arrangement. Both girls were up at night crying and were comforted by CB with assistance from F and E. CB commented that the respondent was not there to help. Eventually it was decided that it would be best for the girls to return to school and their routine. CB accompanied them to and remained with them in Burma. XZ could not settle and was often hysterical. YZ developed appendicitis and had to travel to Bangkok for treatment. According to CB, whilst the respondent made a bit of an effort, she was left to deal with most of the grief which the children were suffering. She said this was a very difficult time for all of them. The girls were very upset, confused, and angry and unable to sleep. One of their main concerns was where and with whom they were to live. CB reassured them that she was willing to stay with them, whatever they decided. The respondent employed a nanny for the girls. She was a South African who just appeared but was dismissed just as swiftly. He left at the end of May and the girls and CB at the beginning of June. They met for a short holiday in Bali. On 22 June, the girls returned to Northern Ireland with CB, a Burmese nanny and a driver. Later they all went to Florida and other places in the USA for a holiday. The relationship between the respondent and CB deteriorated. There were problems about money and her expenditure as well as accusations by her about his affairs. Whilst in Hawaii both girls agreed to go back with him to Singapore and CB was to accompany them. CB said the girls kept changing their minds about this. The respondent said that it was part of this arrangement that he agreed the girls could go to the west of Ireland. The girls returned to Northern Ireland with CB and then went to the west of Ireland for a family holiday with their mother's relatives. The respondent and CB did not accompany them. The plan appears to have been that the girls would return to Belfast on 7 August from the west of Ireland and travel to Singapore the following day. CB averred that she was having second thoughts about going to Singapore because of the breakdown in her relationship with the respondent in Florida. She told the girls by phone and, also, the respondent. He travelled to Belfast on 7 August to discuss with her whether she would return to Singapore with them and, if so, what role she would play. CB then decided she would go with them. She considered chaos would ensue for the children if she did not. The respondent disagreed that he travelled to Belfast on 7 August to speak to CB about going to

Singapore or not. The original plan was for the respondent to collect the girls in the west of Ireland. This was changed and their uncle drove them to Belfast. They were to be back by 5pm and leave Belfast International Airport at 7.30pm or 9.30pm. They were late leaving the west of Ireland and, when the respondent discovered this, he returned to London alone. He disagreed that this was typical of how he lived his own life without regard to the girls. It was arranged that CB would bring them over the next day and the necessary flight bookings were made. When they arrived in Belfast, CB told them to get packed for the journey to Singapore, but they said they would not go. They wanted to stay in Northern Ireland. At this time CB had already agreed with the respondent that she would go to Singapore with them. They phoned the respondent and there was an argument and tears. The respondent said that the girls asked why he had not waited for them, and he explained that he had a discounted fixed ticket and that he would see them the next day, whereupon they said they were not going because YZ did not wish to go. He said he suspected something was going on when he was told he did not need to collect them in the west of Ireland and again when he was in Belfast, on being told that they had not yet left the west of Ireland. CB said that the respondent spoke to her and said – “Forget it. You can stay there. I’m not supporting you, you can suffer.” She accepted that this was said in anger. He averred that CB had put ‘second thoughts’ into the girls’ minds when she said she had doubts about going to Singapore herself. He then remained in London until XZ travelled over on the 16 August. He claimed that he did not return to Belfast at that time because he was a broken man and not his usual self. He said he let them stay in Belfast with reluctance, because forcing them would not help.

[8] The respondent is an intelligent and shrewd man, but nonetheless a somewhat suspicious man. He suspected a conspiracy by AB’s family to induce the girls to remain in Northern Ireland, and that CB was a party to this. He stated that it was clear from the day after the funeral that they wanted the children. It was put to CB that the respondent believed the girls were being kept here, and the reason was that he was viewed as a useful source of money. She said this was a ridiculous suggestion and an insult. There appears to be an estrangement between the respondent and AB’s family. It appears that they would prefer the girls to stay in Northern Ireland. CB denied that she influenced the girls in their decision in any way and I accept that. My impression was that CB is a young woman who is motivated by a desire to protect her half-sisters, to respect their wishes and to do what is best for them. There are several good reasons why she should not wish to become embroiled in their future, nevertheless she has done so.

[9] On 16 August, XZ went to London to see F at her invitation. The respondent turned up. According to CB, XZ rang her in hysterics saying he would not let her to return to Northern Ireland and that she and YZ had to come to London. CB spoke to the respondent and said she was going to travel to London to find out what was going on. The respondent was rude to her and said she would not get through the door. XZ required a sedative to get her to sleep.

[10] The respondent and XZ returned to Northern Ireland on 18 August. He intended to take them back to the Far East. He found YZ clear in her mind that she did not wish to return. XZ was more apprehensive about staying. There were concerns about racism. Discussions took place about what should happen – should one return to the Far East with him and the other remain in Northern Ireland. XZ felt guilty that he would be on his own. YZ, who is a very strong-willed girl, refused. Then both decided they would stay. It was CB's evidence that the respondent agreed to this, and they all parted on good terms. The respondent said that, as they were still grieving, he would let them stay temporarily until their situation improved. He claimed that at no time did he intend that they would stay here indefinitely and stated, "I will not let that happen." The girls have lived in the Far East for years with chauffeur driven cars at their disposal. Now they travel on public transport. He asks rhetorically – "Why have they changed all of a sudden." He agreed with Miss McGreenera QC who with Miss Jordan appeared on behalf of CB that they are here because he agreed to them being here, albeit technically.

[11] CB thought they parted on good terms. She understood when he left on 18/19 August that he was allowing them to stay with her and to go to school in Northern Ireland and that they could stay here until they were ready to return to the Far East.

[12] The respondent returned to Singapore. He had consulted solicitors in Northern Ireland and on advice applied in Burma for a court order in respect of the children. It is not clear whether he returned to Burma for this purpose at this time.

[13] CB set about arranging their education. She was unsuccessful in obtaining places in two schools in Belfast but obtained places in a third school. Problems arose over outstanding bills. CB forwarded them to him, and he paid two sums of £980 into her account on 30 August 2000. If the girls were to remain in Northern Ireland, by whom and how this would be funded seems to have been an irritation in the background. CB was on income support from 8 August 2000. The girls commenced school in Belfast and, according to CB, settled in quite well.

[14] The respondent claimed that he was never consulted about the girls commencing school in Belfast in September. He complained that he was not given the respect due to him as the girls' father. The only time he was consulted was when it came to pay the bills. Nevertheless, he did want them to go to school and expected them to do so but expected to be consulted about it. There has been allegation and counter allegation about this period. I am satisfied that he allowed them to stay albeit reluctantly and that he was aware that they would attend school here. I do not accept that CB made all the arrangements for their education without his knowledge and approval, even if tacit. I do not think he really knew what to do in the circumstances. He wanted the children to return to the Far East. He did not wish to force them to do so. He appreciated they were grieving. While he allowed them to stay, he was also seeking to change their minds and was, naturally enough, active in trying to do so. All of this probably contributed to the tension in the situation. The

girls did not want to return at that time and certainly not without CB. They probably did not know where they wanted to live in the future or with whom. They perceived their life in Singapore, in their mother's absence, would be a lonely one with nannies, maids and chauffeurs and that the respondent would be there only periodically. It is an indication that his relationship with them was not as close as he states that he was unable to handle the situation that had developed as well as the concerns that the girls clearly had. Their source of comfort was CB and their mother's family. He was unable to counter this and was suspicious of the motives of others and became frustrated and angry. His concern was that the girls would become too settled here and not wish to return to the Far East ever.

[15] The respondent returned to Northern Ireland on 13 September. CB had a part-time promotions job in Belfast, and he went to see her there. According to CB he told her he had come to take the girls back to the Far East. He said he had a legal document for this purpose. She said that if the girls want to return with him that was okay but that he could not force them. He replied that he would try to persuade them and, if that did not succeed, he would force them to return. He asked where they were, and she told him at their Aunt G's (AB's sister). He went there only to find that they had gone. He was worried that they were hiding the children from him. That day he had an exchange of words with the girls' Aunt G.

[16] In view of what had happened in London and how it unsettled the girls and the respondent's comment that he would force them to return, CB went to see a solicitor the following day, 14 September, and on the same day an application was lodged to have the girls made wards of court. The next day, 15 September, they were confirmed wards of court by the Master. He decided that the Official Solicitor should come in to represent the children as Guardian ad Litem.

[17] On 18 September, the respondent spoke to CB on the phone. He said he would agree to the girls staying in Northern Ireland this school year provided they returned in June 2001 but that he wanted this in writing. He said he would win any court case and that they would never see this country again. CB was confused as to his feelings – sometimes he would say he would not force them back to the Far East and on other occasions he would say they would not see Belfast again.

[18] Arrangements were made for the girls and CB to receive counselling and for the respondent to attend if he was available. CB wanted a session with him on her own with a counsellor so she could explain why she had acted the way she did. It did not go well. The respondent said he wanted the girls back, but on their own and that CB was not welcome.

[19] CB has averred that, since her mother died, the respondent has asked her would she be there for him and the children. She said yes and that she was willing to live in Singapore. She does not believe she could go there now – she does not know what sort of life she would have there. She feels she has been the girls' emotional support since the death of their mother in March. She admits it has not

been easy, especially the first few months. The loss of their mother had an enormous effect on them. She was their carer. The respondent was only with them and their mother for part of each month. The girls reacted badly to their mother's death. She now sees a great change in the girls – they are sleeping better, and their behaviour has improved, though they still need a lot of support. She loves them very much. She says he cares for them and they for him. However, she does not believe he would give them the personal care and attention that they require. It is not that he is not capable of it, but his business requires him to be away from home much of the time and the girls would be left with a nanny or perhaps a relative of the respondent. Even when he is around, she feels he needs to make more of an effort with them. They have not been to school in Singapore for three years and have no friends there. In Northern Ireland they have substantial family and support. Both girls are strong-willed and opinionated and not afraid to speak their minds. They have said they wish to remain with CB in Northern Ireland for the time being. They are not easily influenced. The respondent was faced with his two daughters who were hysterical and wished to stay here and he decided to allow them to do so. CB admitted that this is a grave responsibility for her and that it cannot be a short-term measure. She is concerned that the respondent may marry again, now that he is divorced. She is also concerned that, in Burma, she would have no standing with any court and fears the considerable influence of the respondent and his wealth. She hopes that the girls can build a relationship with their father and, one day, go to Singapore, but is very much opposed to them being forced to do so against their will. The only reason she has made the application before the court is because the girls are adamant they want to stay in Northern Ireland. She is anxious that their wishes and feelings are taken into account and their needs catered for. She is not anxious that they would stay with her but if that is what they want she would put their interests above her own as she has done since March 2000 and would do so for the next five years. She would not try to persuade them not to go back to the Far East.

[20] The respondent feels hurt and disappointed that CB applied to make the children wards of court. He does not dispute that she is a close sister to them. Nor does he dispute her contribution to their well-being. But these girls are his children, and he considers they should be with their father and that the family should be together after the loss of their mother. They have been raised in the Far East and should return to live there. He cannot live in Northern Ireland to be with them. He states that he has a good relationship with them when alone but when others are present, they can be cold towards him, though he complains they do not listen to him. He is willing to fill the gap left by their mother and has hired another director to assist with his business and to give him more time to spend with the girls. He feels that he has been shamelessly exploited, and the children held to ransom. He has done everything asked of him and then paid the bills presented to him. He feels his position as father of the children has been undermined and he is very hurt by what has been said and done. He complains that he "has been shafted continuously." He states that his relationship with CB is now non-existent after she recently refused to hand over the deeds of the grave. He paid for the funeral. The grave was registered in the name 'Mr (sic) CB.' He wished the headstone inscribed

with the word 'cherished wife of...' but her family said he could not do this. He is indignant about the way he feels he has been treated. He believes that CB feels insecure after her mother's death and concerned that she may not be able to maintain the same lifestyle. He considers this and the row between them in America about his relationships with other women is what has prompted her to take these proceedings. He stated that if he had to put up with CB in order to have the children back, he would do so. She would not be welcome to work in Singapore but would be welcome for holidays there.

[21] At the conclusion of his evidence the respondent made an impassioned plea to the court in these terms - "Not having a father will enhance their trauma; they have not lived in the United Kingdom for any length of time; they are still grieving from the shock of losing their mother; they probably feel they can grieve better in Northern Ireland; I would like the opportunity as their father to take them back to where they belong, to mend our life and to get on with our life as a family; if they want to bring [CB] along I would not object to her coming with them; all I want is the opportunity to bring up the girls as their father which I am; I am willing to let them stay here to August 2001 at the latest, but they can return earlier if they wish; I wish them to start school in Burma or Singapore in August 2001; I want them back as I love them so much".

[22] On 1 September 2000 at a District Court in Burma, the respondent was granted an order under the Guardians and Wards Act 1890, as amended. A certified translation of the order of the Deputy District Judge was produced to the court. The Guardians and Wards Act 1890 formerly applied to that part of the British Empire which comprised the Indian Sub-continent and the Far East including Burma, when Burma was administered by and as part of India. Under this order the respondent was appointed to be the guardian of the person and property of the two girls. A guardian is defined in section 4 as "a person having the care of the person of a minor or of his property or of both his person and his property."

[23] Section 6 provides:

"6. In the case of a minor, nothing in this Act shall be construed to take away or derogate from any power to appoint a guardian of his property, or both, which is valid by the law to which the minor is subject."

"7-(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made -

- (a) appointing a guardian of his person or property, or both, or
- (b) declaring a person to be such a guardian, the Court may make an order accordingly."

[24] The jurisdiction in the court to make an order is to be found in section 9(1) which states:

“9.-(1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.”

[25] I do not suppose that “ordinarily resides” means anything different than the expression “habitually resident” used in this jurisdiction.

[26] Section 13 makes provision for the hearing of evidence in these terms:

“13. On the day fixed for the hearing of the application, or as soon afterwards as may be, the Court shall hear such evidence as may be adduced in support of or in opposition to the application.”

[27] It is not known what evidence was produced to the District Court nor what form it took.

[28] Section 17 makes provision for the matters which are to be considered by the court in appointing a guardian:

“17 (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.”

[29] The duties of a guardian are to be found in section 24 which states:

“24. A guardian of the person of a ward is charged with the custody of the ward and must look to his support,

health and education, and such other matters as the law to which the ward is subject requires.”

[30] The fact that the respondent saw fit to apply for a court order appointing him guardian of the children does not support his contention that he was married to the girls’ mother. Instead, it implies the contrary.

[31] The first issue raised in this application was the jurisdiction of this court, either under its inherent jurisdiction or under the Children (Northern Ireland) Order 1995, to consider the welfare of the two girls XZ and YZ. The jurisdiction of the court is governed by the Family Law Act 1986 as amended by the Children Act 1989 and the Children (Northern Ireland) Order 1995, section 19 of which now reads:

“19-(2) A court in Northern Ireland shall not have jurisdiction to make a section 1(1)(c) order in a non-matrimonial case (that is to say, where the condition in section 19A is not satisfied) unless the condition in section 20 of this Act is satisfied.”

(3) A court in Northern Ireland shall not have jurisdiction to make a section 1(1)(e) order unless –

- (a) the condition in section 20 of this Act is satisfied, or
- (b) the child concerned is present in Northern Ireland on the relevant date and the court considers that the immediate exercise of its powers is necessary for his protection.”

[32] Section 1 of the Family Law Act 1986 proscribes the order to which the Act refers:

“(c) An Article 8 order made by a court in Northern Ireland under the Children (Northern Ireland) Order 1995, other than an order varying or discharging such an order;

(e) an order made by the High Court in Northern Ireland in the exercise of its inherent jurisdiction with respect to children –

- (i) so far as it gives care of a child to any person or provides for contact
- (ii) excluding an order varying or discharging such an order.”

[32] Section 20 defines the jurisdictional requirement in these terms:

“20 Habitual residence or presence of child

(1) The condition referred to in section 19(2) of this Act is that on the relevant date the child concerned –

(a) is habitually resident in Northern Ireland, or

(b) is present in Northern Ireland and is not habitually resident in any part of the United Kingdom or in a specified dependent territory

and in either case, the jurisdiction of the court is not excluded by subsection (2) below.

(2) For the purposes of subsection (1) above, the jurisdiction of the court is excluded if, on the relevant date, matrimonial proceedings are continuing in a court in England and Wales, Scotland or a specified dependent territory in respect of the marriage of the parents of the child concerned.

(3) Subsection (2) above shall not apply if the court in which the other proceedings there referred to are continuing has made –

(a) an order under section 2A(4) or 13(6) of this Act (not being an order made by virtue of section 13(6)(a)(i)), or a corresponding dependent territory order, or

(b) an order under section 5(2) or 14(2) of this Act, or a corresponding dependent territory order, which is recorded as made for the purpose of enabling Part I proceedings with respect to the child concerned to be taken in Northern Ireland,

and that order is in force.”

[33] Article 20(4) defines the relevant date for the purposes of section 20(1) as the date of the commencement of the proceedings, in this case, 14 September 2000. Thus a court in Northern Ireland has jurisdiction to make an order under Article 8 of the Children (Northern Ireland) Order 1995 (that is, a residence etc order) in a non-matrimonial case (which this is) if the child is habitually resident in Northern Ireland or, if not habitually resident in Northern Ireland, is present in

Northern Ireland and is not habitually resident in any part of the United Kingdom or in a specified territory. Thus, habitual residence in Northern Ireland or presence in Northern Ireland (and not habitually resident in any part of the United Kingdom) is sufficient to ground jurisdiction to make an Article 8 order. A court in Northern Ireland has jurisdiction to make an order under its inherent jurisdiction if the conditions necessary for an Article 8 order prevail and, in addition, may also make an order under its inherent jurisdiction if the child is present in Northern Ireland on the relevant date and the court considers that the immediate exercise of its powers is necessary for the child's protection. Thus, the issues may be refined to two questions – were the girls habitually resident in Northern Ireland on 14 September 2000 and, if not, were they present in Northern Ireland and in need of immediate protection. The term habitual residence has been the subject of judicial interpretation in several cases. The classic definition is that of Lord Brandon in *Re J (a minor) (abduction: custody rights)* 1990 2 AC 562 at pp578-579 when, in defining the term with reference to Article 3 of the Hague Convention on Civil Aspects of International Child Abduction, said:

“The first point is that the expression ‘habitually resident’ as used in article 3 of the Convention, is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words which it contains. The second point is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. The third point is that there is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming resident in country B. A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have become habitually resident in country B. The fourth point is that, where a child of J's age is in the sole lawful custody of the mother, his situation with regard to habitual residence will necessarily be the same as hers.”

[34] In *Re B (minors) (abduction) (No 2)* 1993 1 FLR 993 at p995, His Honour Judge Waite added some helpful comments in relation to children residing with both their parents:

“1. The habitual residence of the 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 adopted voluntarily and for settled purposes as part of the regular order of their life for the time being, whether of short or long duration. All that the law requires for a ‘settled purpose’ is that the parent’s shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled.

3. 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. The House of Lords in *re J*, sub nom *C v S* (above) refrained no doubt advisedly, from giving any indication as to what an ‘appreciable period’ would be. Logic would suggest that provided the purpose was settled, the period of habitation need not be long.”

[35] Later he offered some helpful comments on how the issue of habitual residence should be approached by a court. A detailed inquiry into a party’s intention was generally inappropriate. At p989 he said:

“...it is normally sufficient for the court to stand back and take a general view. A settled intention is not something to be searched for under a microscope. If it is there at all it will stand clearly out as a matter of general impression.”

[36] A number of principles emerge from the authorities:

“(i) habitual residence is not defined;

- (ii) habitual residence is a question of fact to be decided by reference to all the circumstances of the particular case;
- (iii) a person may cease to be habitually residence in a particular country in a single day;
- (iv) for a person to acquire an habitual residence in another country it is necessary for him to reside there for an appreciable period of time and to have at that time a settled intention to reside there indefinitely;
- (v) what is an appreciable period of time will depend on the facts of the particular case. In some cases it may be shorter than others."

[37] Where the word 'parent' is used in a legal context it usually refers to a mother and father who are married to one another. The respondent and AB were not married to one another. The respondent is a putative father. That status has significant consequences in children's legislation and in certain types of case relating to children. At present, a putative father does not have parental responsibility. However, in determining the habitual residence of a child, is the fact that his father is a putative father relevant. Where the mother and father live together, I do not think it is relevant. If the child lives alone with his mother, he has the same habitual residence as his mother. If the mother and father live together with the child all the time, the habitual residence of all three will be the same. Where the natural mother dies and the putative father assumes care of the child, then the child will have the same habitual residence as the putative father as a matter of fact. The question for determination is the residence of the child and the legal relationship with the father is of no or little assistance in determining that issue. It is a question of fact. At the date of AB's death, she and the children were habitually resident in Burma, despite the limited nature of their right to remain there. A more difficult question is – what was the respondent's habitual residence at the date of her death and thereafter? The evidence suggests he spent ten days in Singapore, ten days travelling to different countries and ten days in Burma. He is a Burmese national and maintained a house there where his partner and their children were based. He maintained homes in Singapore and London. This was not a conventional family unit, all of whose members were based at the same time in the one location. He came and went. After AB's funeral he and the children together with CB returned to Burma, but only for several weeks, before going to Bali, then Northern Ireland, then to the USA and then back to Northern Ireland. It was the intention of the respondent and AB that she and the children move back to Singapore and that the girls should attend school there. If AB had not died, Singapore would have become the habitual residence of AB and the girls. It is still his intention that the girls return to Singapore and attend school there and that they do not return to Burma. Whatever may have been his habitual

residence at the date of AB's death, if he had one, Singapore has now become his base and where he intends the children to be based and he wishes them to reside with him in Singapore. Therefore, at the date these proceedings commenced, that is September 2000, it seems, if he was habitually resident anywhere, he was habitually resident in Singapore or intended to be so. When he might assume such habitual residence might depend on whether or not the girls were going to go to school in Singapore and reside there. If not, he may have continued to divide his time between different places. There is no evidence that he has resided in Burma during the summer of 2000. All the evidence points towards him fulfilling the original intention of residing in Singapore and sending the girls to school there. After the girls left Burma to go to Bali there seems to have been no intention to return to Burma to reside there. Therefore, it can be said the girls were no longer habitually resident in Burma. Yet he sought and obtained a guardianship order in Burma. The Burmese courts would only have jurisdiction if the girls were ordinarily resident there. In seeking that order, I assume the respondent believed they were ordinarily resident there, yet he wished them to return to Singapore. Then they visited different countries and returned to Northern Ireland. At this point they themselves had not assumed habitual residence anywhere else, unless it was derived from the respondent. It is at this point that the nature and extent of the respondent's legal and factual relationship with the girls is relevant. Where married parents live together in settled circumstances in one location, and one dies the children will derive their habitual residence from the survivor. The same would probably apply to unmarried parents who live together in settled circumstances in one location. In this case, AB and the respondent did not live together all the time in Burma. The girls derived their habitual residence in Burma from their mother. When she died, they did not automatically derive their habitual residence from the respondent. As a matter of fact, they were not residing with him for much of the time in the five-month period after her death and, prior to that time, he lived with them only on a periodic basis. As a putative father without parental responsibility, he would have to demonstrate that the children should acquire his habitual residence. A married father or a father with parental responsibility might find that an easier task. The guardianship order obtained by the respondent on 1 September would be of greater significance if the intention was to return to Burma to reside. That was not the case. As a question of fact, the girls had not acquired any habitual residence derived from the respondent by 1 September 2000. Thus, the arrangements made between the respondent and CB are important. Their enrolment in a school in Belfast signalled a commitment to residence in Northern Ireland for a significant period. The respondent denies that he was consulted about the girls' schooling. He is a successful businessman, aged 40, with a forceful and overbearing personality. CB is a 25-year-old woman, not long out of university, and with limited experience of the world. She does not have a very forceful personality. I doubt if she would take a step such as enrolling the girls at a school without at the least the tacit, even if begrudging, agreement of the respondent. In early August the girls stated they wished to stay in Northern Ireland. The respondent did not want to force them to leave. He was aware that arrangements were required to be made for their education. In my view, at the very least, but probably more, he gave CB to

understand that she should proceed to make such arrangements, and she did. The respondent did not see this as a permanent arrangement. It was to be a temporary arrangement until such time as the girls wished otherwise. Whilst he permitted this to proceed, he was at the same time looking ahead and endeavouring to improve his legal position. Thus, he sought and obtained the court order in Burma. Armed with that he took a bolder approach. By that time the girls had commenced school. Whilst he sought to bring about their return to Singapore, he did not force the issue and acquiesced in the situation which by that time had developed. Whilst this arrangement was, to his mind, always temporary, it was to be for some significant time. By 14 September 2000, the girls had been resident in Northern Ireland with their father's acquiescence since 8 August, a period of 6 weeks and were enrolled in and attending school. In their circumstances this was an appreciable period of time. The commitment to schooling here and the open-ended nature of the arrangement lead me to the conclusion that there was a settled intention to reside in Northern Ireland indefinitely. Whilst all this was developing the respondent was considering ways of coping with this difficult situation. I do not think he had reached the stage when he would consider attempting to force the girls to return to Singapore. He was still acquiescing in their remaining here for the time being. However, it was always a possibility that he might change his mind and attempt to force them. I, therefore, conclude that, as a question of fact, on 14 September 2000 the girls were habitually resident in Northern Ireland and were not, and had not been for some time, habitually resident in Burma. If that were incorrect then the girls were present in Northern Ireland and, in view of the unusual situation which might change at any moment, they were in need of the court's protection in order to determine their future. Thus, on either basis the court had jurisdiction to hear and determine the application in wardship and under the Children (Northern Ireland) Order 1995.

[38] The Official Solicitor saw the girls on 14 September 2000. In her report dated 20 September, she said – “they had just recently learnt that their father had come to Northern Ireland with either the intention of bringing them back to Singapore or working out arrangements for their return to Singapore at a later date. The minors were quite distressed about this as they thought that they might return to Singapore without much consideration or without their views being taken into account.” It is important to note that the respondent had come to Northern Ireland with his son E at a time when both had pretended to be overseas. The Official Solicitor later said:

“Therefore the preliminary views which were being expressed to me on 14 September were that the girls did not want to go to Singapore with their father. Additionally, they pointed out that their father had at one stage mentioned that he may consider letting them stay in Northern Ireland until they finished a year's schooling. I pointed out that this may not in fact be all that helpful to them and if they were to stay here for a year it could be even more unsettling if and when they had to leave. At this stage the girls pointed out that they would like some

stability of environment. When I asked what they meant by this they pointed out that their father would tend to travel a lot and whilst they enjoyed travelling they would like to have a particular base from which they did not have to travel too much or too often. They pointed out that they had such a base home in Burma."

[39] The Official Solicitor interviewed the girls again on 20 September 2000. In the light of a comment made by XZ, the Official Solicitor concluded that "it appeared as if [CB] had led them to believe that she was their Guardian." During this visit the girls were able to inform the Official Solicitor about the rows between their mother and father and that they occurred when their mother found out about his affairs. The Official Solicitor then investigated with them where, and with whom, they wished to live and why. They were emphatic that they did not wish to leave Northern Ireland. She stated:

"I discussed the possibility of the girls returning to Singapore with their father. Both girls informed me that they love their father very much, however, because he has not been used to spending a lot of time with them on his own he does not know how to handle them. By this they mean that sometimes simple things arise which their mother would have dealt with, however, their father becomes cross about. The girls also informed me that their father is used to having everything done his own way whereas they would like to form a relationship with him whereby they could discuss things and reach a compromise.

I asked the girls if they would go to Singapore in any circumstances. At first [XZ] said that she might go but only if [CB] was going. Later she said that she did not think she would even go if [CB] was going. Additionally she pointed out that if she was forced to go to Singapore against her will (and without [CB]) she would run away. When I asked [YZ] about her position she said that she did not wish to return to Singapore, she liked Northern Ireland, she enjoyed having [CB] and her Aunt [G] close at hand and she would like to write to the Judge about the situation.

I asked the girls how they would feel if they had to leave [CB]. [XZ] pointed out that she will not leave [CB] and [YZ] said that if she had to leave [CB] it would feel the same [as]... her mother dying all over again. I did say to [YZ] that if [CB] could go to Singapore would she be

content if she knew she would see her Aunt [G] every year and she indicated that she may be able to cope with this. It is clear from the part of the conversation dealing with the above that the children are absolutely grief stricken about their mother. It must be remembered that their mother is only dead a very short time and these girls are craving stability.

It also appears to me that it is essential that the girls, having lost their mother so recently, have a close female figure to relate to. There does not appear to be any one other than [CB] who can fulfil this role. The girls informed me that there was some mention of their Aunt [H] coming to live with them, however, they are very unhappy about that. The girls informed me that they are always very courteous to their Aunt [H], however, they are not particularly fond of her. They also informed me that sometimes their father and their Aunt [H] would disagree and their father knows that [XZ] does not get on particularly well with Aunt [H].

The girls seem to have a considerable concern that in spite of their father's statement that he will restructure his life to spend more time at home this will not be the case due to his business commitments. The girls remember that their father was not at home previously due to his commitments and he may have to continue this even if to a lesser extent. Nonetheless, they still believe that their father will simply employ nannies, drivers, etc to look after them and he will still not be there that much. They have stated that if this is the case there is not much point in them being in Singapore.

Additionally, the girls pointed out to me that they have never spent much time alone with their father and there has usually been someone else with them such as their mother or [CB] or a nanny, etc. The girls pointed out that they have not been used to being with their Dad on their own and they would find this hard to adapt to, in other words they are used to having a close female figure around."

[40] The Official Solicitor's conclusions were:

"(1) The girls love their father and acknowledge that he loves them both very much. [XZ] perceives that

she is less loved than [YZ] and this is something which [the respondent] may address.

- (2) The girls are in a state of extreme grief and are coming to terms with the loss of their mother (as is [CB] and [the respondent] at the loss of his partner).
- (3) It appears to me that the girls may not be emotionally fit to be parted from [CB] and any enforced parting could have very serious consequences for their emotional well-being. Nonetheless, on the basis of the information available to me at present, it appears to me that it may be best for the girls to go to Singapore to start to build a new family life with their father.
- (4) Due to the recent difficulties in the current proceedings the previous points in paragraph (3) appear to be currently incompatible. It is my view that if [the respondent] and [CB] could work together and retrieve their previous good relationship to enable them and the girls to go to Singapore this would be the option which would be in the girls' best interests.
- (5) I am not sure how or if my recommendation can be taken forward but I will assist the Court in whatever way I can. If it is not possible for the parties to come to some arrangements and the Court in his country has jurisdiction to deal with this matter it will obviously have to run to a full hearing. This will be in nobody's interests and will have a particularly poor effect on [XZ] and [YZ].

[41] Arrangements were made for the respondent to spend seven – ten days with the girls prior to 23 October 2000 and for the Official Solicitor to interview them and report to the court. The respondent was unable to come to Northern Ireland to enable this to take place and only arrived on 24 or 25 October. Arrangements were then made for him to see them on their birthdays in November. The Official Solicitor saw them on 27 November and reported to the court. She formed the impression that their relationship with their father was improving. She stated:

“I ha[d] a long chat with the girls, accompanied by the Deputy Official Solicitor. The girls informed me that they still love Northern Ireland and would like to remain

living here. [YZ] is absolutely definite about remaining in Northern Ireland, however, [XZ] gives the impression that, if she were to be accompanied by [CB], she would go to live in Singapore. It is clear that [XZ] is still concerned about her father being on his own in Singapore although she appreciates that he travels a lot.

The girls still point out that living in Singapore could be lonely for them as their father would continue to have to travel a lot. They appreciate that their father would make enormous efforts to try to be in Singapore as much as possible, however, due to the nature of his business this would be extremely difficult for him.

Although I spoke to the girls for over an hour I do not have a lot to add to my earlier report. [XZ] seems to be of the view that even if the Court decides that the girls should return to Singapore with their father that their father will not force them to go against their will. I said to the girls that this was my belief as well as I do not believe that their father would deliberately do anything which would make them unhappy – rather he wishes to develop his relationship with them as their father.

It does seem clear however that if the girls are to go to live in Singapore they do wish to be accompanied by [CB]. The girls regard themselves as having good family backup in Northern Ireland which they would not have in Singapore. They regard themselves as living in a very stable environment at the minute. The girls are quite clear that the way of ensuring that they retain some stability on any return to Singapore would be to have [CB] with them. They did point out, however, that they are not sure if [CB] would wish to go to Singapore.”

[42] The reports of the Official Solicitor have presented clearly the issues and the difficulties in this case as well as the views expressed by the girls who are now aged 14 years and two months and 13 years and two months respectively.

[43] All things being equal, the future of young children should be determined in the jurisdiction of their habitual residence. Where circumstances dictate otherwise, this court has jurisdiction when the children are present here and the protection of the court is necessary. There is a presumption that children should be with their natural parents. In the case of unmarried parents, the children should be with the parent with parental responsibility namely, their mother. If their mother dies and there is no other person with parental responsibility, then there may be competing

claims about who is to have responsibility for the children. Where in the scale a putative father ranks among those claims would depend on his relationship with the children. If he and the children lived with their mother in a settled family unit his claim to responsibility for the children should be significant one. On the other hand, a guardian appointed by their mother in her will might take precedence. No such appointment was made by AB in this case. AB appointed the respondent as her executor but not guardian of the children. CB stated that her mother expected her family to look after the children if anything happened to her.

[44] It was submitted by Mr Long QC that this was a case in which the children were being retained in Northern Ireland against the respondent's wishes. Neither Burma nor Singapore are signatories of the International Convention on the Civil Aspects of Child Abduction (the Hague Convention). However, generally speaking, the principles applicable to retention from and return to, non-Convention countries should apply. Difficulties often arise where the non-Convention countries have child welfare principles very different from those applicable in this jurisdiction. The court has to ask whether the competing courts would apply welfare principles which are child centred. The wording of the Guardians and Wards Act 1890 would suggest that the courts in Burma might do so – see section 7(1). However, there is no evidence about the system of law applicable in Singapore nor about the principles which might be applied there. Mr Long QC submitted that there is a presumption that other countries, whether signatories of the Hague Convention or not, will apply child centred welfare principles.

[45] In applications of this nature the views of the children are relevant but rarely determinative. The older and more mature they are, the more weight should be attached to them. The court should look to see if cogent reasons have been given for the views expressed by the children and will then have to determine what weight should be attached to them.

[46] Miss McGreenera QC argued that whilst the mother resided in the Far East, Northern Ireland was always home and her fall-back residence. The purchase of the house in Belfast confirmed that. Miss McGreenera QC accepted that if this was a retention case then the broad principles applicable in Convention cases should apply. But the respondent is not seeking the return of the children where he could have done so, rather he is resisting the application of CB for a Residence Order. If Convention principles are applicable, she contended that the respondent had no rights of custody until 1 September 2000.

[47] Up to 1 September 2000 the respondent was clearly a putative father without parental rights or responsibilities. In this jurisdiction parental responsibility means all the rights, duties, powers, responsibilities and authority which by law a parent has in relation to the child and his property as defined in Article 6 of the Children (Northern Ireland) Order 1995. Under the Guardian and Wards Act 1890 the only person who can apply to be appointed a guardian is a person who desires to be or claims to be the guardian to the child, or any relative or friend of the child.

Guardianship is defined as having the care of the person of the child or his property or both. Such a person does not have the equivalent legal rights as a person with parental responsibility. It does seem to me that, whilst recognising the guardianship appointment of the respondent by the courts of Burma, through comity of the respective courts, it does have certain limitations and the order of the Burmese court *ex parte* weighs some but not a lot in the balance of matters in this jurisdiction. The more significant jurisdiction in the Far East appears to be Singapore to which the family was ultimately destined. It was argued by the applicant that the court should consider the limited relationship between the respondent and his children. He regularly spent two thirds of each month away from the home and, when he was there, he was invariably working at his business interests. There does seem to have been a considerable dependency on employed staff including nannies and drivers. This is the way the respondent organised his domestic arrangements, to enable him to devote his time to his business. He averred that he would change this lifestyle. While he might do so in the short term, I do not consider it would be sustained. My clear impression of the respondent was that he lives for his business, and nothing is allowed to interfere with it. These are relevant factors to be weighed in the balance, but in themselves could not be determinative of the decision whether the children should live with their putative father or not.

[48] The children have expressed their views to the Official Solicitor on several occasions. At times XZ has expressed differing views. YZ has been more consistent. At this time, neither of them wished to leave Northern Ireland or CB. They are of an age when their views must be respected and given due weight. However, it must be remembered that a child's perception can often be short term, whereas the court has to consider their future until they reach majority.

[49] It was suggested that this was a case of retention of the children against their father's wishes. Retention usually involves consent to the children remaining overseas to a certain date and not being returned on that date. In Convention cases there must be an identifiable occasion when wrongful retention has occurred. In this case, the respondent consented to the children remaining for an indefinite period of time in Northern Ireland. He came to Belfast on 13 September 2000 with the intention of persuading the children to return to the Far East with him. They were made wards of court the next day. I do not think the stage was ever reached at which it could be said clearly that the children were being retained here beyond a date to which he had earlier consented. Once he decided firmly and finally that they must return with him, then in a technical sense it might be said they are being retained here. However, even at the time they were made wards of court, he was not prepared to act against their wishes and was ambivalent in his views about where they should reside at that time. He has not sought an order for their return. Thus, the analogies with retention cases under the Hague Convention are of little assistance. These are two children within the United Kingdom whose relatives were sufficiently concerned about their welfare to seek the protection and guidance of the court. At that time, they were unaware of the nature of the court order obtained in Burma. Their connections with Burma were, by then, severed. They are British

subjects with no other habitual residence elsewhere, but with strong connections with Northern Ireland. It is probable that their mother would have wished them, at the very least, to have a substantial relationship with her relations here in Northern Ireland. Their right to involvement in the children's lives should not be underestimated. Relatives in cases such as these can be made guardians or be granted parental responsibility. This is not a case of two foreign nationals who just happen to be here at a certain point in time. These are British subjects with a substantial connection with Northern Ireland

[50] In any application relating to children, the welfare of the children is the courts paramount consideration. Where and with whom should these children live. The respondent is their father. If married to their mother, he could determine where they should live. But he is a putative father (albeit it with a guardianship order made ex parte in Burma). Should that make a difference? The range of possible relationships which may exist between a putative father and his children is extensive. This is sufficient to justify a difference between the rights of a married father and the rights of a putative father – see *B v UK* (ECHR) 2000 1 FLR 1. But a putative father living with the children's mother, both of whom had the children in their care, has different responsibilities to a father who lived elsewhere and only has periodic contact. While factually different, their legal rights are no greater, but the courts recognise the difference in their respective positions. The Practice Note 1998 1 FLR 491 at p492 suggests that de facto joint custody is not enough to give putative fathers the same rights that married fathers have. It would not appear that Burmese law gives him any greater rights as a putative and natural father, than does the law in this jurisdiction. If it did, he would not have found it necessary to apply to the court in Burma.

[51] Thus, it seems it is for this court to decide the future of these children taking into account the relationship between them and their father and the nature of it, as well as the degree of involvement he has had in their upbringing hitherto, taking their views into account.

[52] In January 2001 I gave the following ruling:

“Solomon's task was no harder. The welfare of the two girls is paramount. They are now aged 13 years and two months and 12 years and two months respectively. They are of an age when the views which they have expressed should be taken into consideration and when they might be determinative of the issue. Recently they have expressed their views clearly. But those views have been expressed at a time of considerable emotional turmoil for them, as well as a change of climate, residence, school and culture. They are part way through the academic year, a factor not to be forgotten. I consider their welfare is best met by remaining in Northern Ireland for the time being.

I grant leave to the applicant to apply for a residence order and make a residence order in favour of the applicant which will be limited in time, that time being not earlier than September 2001. In the meantime I request that the Official Solicitor interview both girls at the end of this school term and again at the end of next term and to report to the court on the girls' situation generally and as to their views about where and with whom they wish to reside and why.

I will arrange a hearing sometime next summer when I will have the views of the children expressed at the end of their academic year, after they have resided in this jurisdiction for about one year, in circumstances of greater maturity and in a more calm and settled atmosphere than they have experienced since the untimely death of their mother last year.

I request the Official Solicitor to arrange the interview at the end of this term at a time which is suitably distant from the anniversary of their mother's death.

If the hearing to determine finally where they should reside is to take place in early September or late August I request the Official Solicitor to see the children a short time beforehand to confirm their views.

If the court is to consider and take into account the views expressed by the two girls, which I believe it should, then it should only do so when it is satisfied that sufficient time has passed from the grave trauma which they have experienced and suffered. A too hasty decision by them may have more serious and unforeseen consequences.

I appreciate that this result at this time may be unsatisfactory for one or both parties, but the court must act in what it considers to be in the children's best interests, which it does. In addition, I make a Prohibited Steps Order that until further notice of this court the children be not removed from the jurisdiction of this court without leave of this court. Both parties will have liberty to file a supplementary statement if considered necessary but no later than five clear days before the hearing date next summer, as well as liberty to apply.

To lose a mother is a traumatic experience for any daughter, the more so when it happens in the circumstances which occurred in this case. When that event is followed by months of turmoil as well as natural grief it is not unreasonable, if account is to be taken of the children's views, that these views be expressed at a time and in circumstances which offer the court the views of the children expressed after longer reflection and in a calmer atmosphere as well as with some greater maturity."

[53] At the request of the parties the hearing which had been anticipated in August was brought forward to June. The nature of the proceedings in December introduced further strains into the relationships between the main parties. The respondent was in Northern Ireland over Christmas. He availed of the opportunity to see his daughters. He was present in their Belfast home on Christmas morning when CB cooked him breakfast. The relationship between them was cordial. The respondent felt unable to accept an invitation to spend Christmas Day with the girls at their Aunt G's when all the family would be present. His relationship with his wife's family remained tense. I gave my interim ruling. The respondent stated that he was very disappointed at the outcome. He left the jurisdiction and travelled to Pakistan on business. He was in most of the major cities of that country but was not in contact with his daughters during this period. According to the respondent, this was due in part, to the telephone system in Pakistan. But it was also due to his decision not to contact them. He might be described as being in a state of pique, after the interim ruling. However, shortly after he left Pakistan, he resumed contact with them and now phones them daily if not several times a day. His relationship with them has also improved considerably. Sadly, his relationship with CB has not improved. Instead, it has deteriorated. Following my interim ruling he would not speak to her at all and avoided all opportunities to do so. At the same time, she was trying to contact him without success. The girls continued to thrive at school. They had examinations in January and were among the top pupils in their respective classes. CB was anxious to improve her relationship with the respondent. He returned to Northern Ireland in April to see the girls. She arranged a meeting with him at a hotel in Belfast. The details of what was said were in dispute. CB maintained that she wanted an amicable arrangement between herself and the respondent. She did not consider the present position was good for the girls, herself or the respondent. Her main concern was that the girls were not forced to do what they did not want to do. She stated that he asked her to drop the case, and she said she would and that she would speak to her solicitor. He stated that he found her crying. She said she was sick and tired of the situation and was going to drop the case and speak to her solicitor. Later, she said she had difficulty contacting her solicitor. I will return to this later.

[54] The present position is that the respondent is opposed to the children remaining in Northern Ireland. He states that they have been raised in the Far East

and have limited association with Northern Ireland. The Far East is their homeland, where they have been schooled and where they belong. Before her death, AB had decided on the school in Singapore. The respondent alleged that it has been put into the children's minds that their mother wished them to live in Northern Ireland should anything happen to her. He is now residing in Singapore. This confirms my earlier views as to his residence and that the girls were no longer resident in Burma and had not yet acquired a residence in Singapore. Their places in the school in Singapore remain open to them with school commencing on 14 August 2001. The respondent's view is that they should finish school in Northern Ireland this term, then spend the summer or part of it here, and then after a holiday overseas, commence school in Singapore in August. While he is opposed to them remaining in Northern Ireland, he stated that he will not force them to do something they do not wish to do, even if the court decides that they should live in Singapore. If the court decides they should remain in Northern Ireland, he wished to take them to visit his sister in America during the summer vacation and then visit Singapore. He has discussed this plan with them, and they have not indicated any opposition to it.

[55] The Official Solicitor interviewed the girls again on 18 April 2001 and her report dated 25 April was available to the court and the parties. They told her that they wished to continue to reside with CB in Northern Ireland and do not wish to live with their father in Singapore. They indicated that they now have a better relationship with him. The Official Solicitor went on to state:

"4. I asked the girls to give me particular reasons for not wanting to go to live in Singapore with their father. Firstly, the girls said that they loved living in Northern Ireland and having so much family here. They love their school and their friends. They confirmed that racism is not a problem, although [XZ] had been worried that it might. Secondly, the girls said that if they went to Singapore [CB] would not be there due to the breakdown in the relationship between their father and her. Also although their half-sister, [F], lives in Singapore [XZ] and [YZ] felt that in any disputes she would take their father's side. The girls consider that they would fight with their father a lot of the time as they have a different outlook from him. The girls also felt that their father would not be at home a lot of the time as he would be away on business and they contrasted this with their current situation where [CB] is always there.

5. I asked the girls what they would do if the Court decided that they should go to Singapore. [XZ] said she definitely would not want to go without [CB] and [YZ] said she would not go. The girls informed me that their dad is very 'touchy' when it comes to discussing [CB] and they

have not spoken since the Court's Interim Order. However, their dad and Aunt [G] do speak.

6. The girls regard their father's continued pressure (via the Court) to get them to Singapore as a nuisance. I asked the girls if they had considered why their father was pursuing the matter but they had not thought about this. When I pointed out that it was my own view that their father's actions were motivated by his love for them they appeared as if this was something which they had not considered. I mention this because I consider it is my duty to inform the Court that there is no balancing influence in this case. [XZ] and [YZ] have clearly been made well aware of their father's shortcomings, however, there is no one to point out their father's good points except myself and this is clearly not my role. Unfortunately, I have now concluded that while [the respondent] has issues to address with the girls it is difficult to do so as [XZ] and [YZ] have been extensively influenced against their father. I emphasised to the girls that their father had been very fair in not informing the Court of the previous relationship between this son [E] and [CB] whereas [CB] had referred to many prejudicial issues regarding their father. I did this to give the girls some balance to their thinking and I told them to discuss this issue with their father and [CB].

7. It is clear that these girls, aged 13 and 12 respectively, wish to remain in this jurisdiction living with their half-sister [CB] who obviously cares for them very much. Nonetheless, in my opinion the girls have been heavily influenced and their views are indicative of this influence. In these circumstances nothing [the respondent] does will be able to change the girls' minds. To this extent the girls' views, while clearly very important, cannot be the deciding factor in what is in their best interests. The girls would like to speak to the Judge and perhaps this will be considered. At this point my conclusion is, that [the respondent] should regain 'parental control' of his children and the parties should try to reach a compromise regarding where the girls reside."

[56] CB disputed the Official Solicitor's conclusion that the girls have been extensively influenced against their father. She also denied that she had made the girls aware of their father's shortcomings. When the Official Solicitor interviewed the girls on 24 September 2000, XZ told her that her father was always saying that she had been brainwashed by her mother's family. This made XZ angry. CB described both girls as being highly intelligent and well able to pick up on

everything that has been going on. I do not think the girls have been influenced against their father, by CB. I think she has sought to improve her relationship with him as well as to improve his relationship with the girls and her mother's family. She seemed genuinely hurt by the suggestion that she was using her half-sisters as a "meal ticket." While she and him disagree over the details of what was said between them at the hotel in Belfast, it was she who initiated this meeting. The respondent has sought to make the case that perhaps she has embarked on something which is more than she can cope with and, as a result, is "sick and tired of the whole business", as he put it. It would be a very serious matter indeed for the girls if this were so. Was this meeting an attempt by CB to extricate herself from a commitment which she can no longer fulfil or was it a genuine attempt on her part to reach an amicable arrangement for the good of the girls. CB is a young woman with her own life to lead and, as I observed earlier, has good reasons not to be involved in her half-sisters' upbringing. I do not think this was capitulation on her part and remain of the view that she is motivated by what is in the girls' best interests. I think there is a very strong bond between CB and the girls arising from the fact that they share the same mother. Her present attitude is that, if the girls wish to stay in Northern Ireland, she will look after them. She said that both girls would be upset should the court order that they return to Singapore. Indeed, she said that XZ would be hysterical should her return be ordered. Both girls continue to thrive and do well in her care. They sat examinations recently and the results so far indicate very high marks for each of them. Both of them are engaged in activities outside school. Making ends meet is still a problem for CB. The respondent does not provide her with money regularly, though he does pay the bills. Occasionally she has to seek assistance from her relatives. AB's belongings remain at the house in Burma. CB and the girls remain anxious to deal with that outstanding business. CB says that XZ, in particular, "wishes to close that chapter." This is understandable. The respondent wishes to take the girls to Singapore and Burma even if they are to continue residing in Northern Ireland. CB is concerned that if the girls returned to either place their father would not return them to Northern Ireland. Neither country is a signatory to the Hague Convention.

[57] It was disclosed that CB had a relationship with the respondent's son E, who is younger than she is. The relationship is now over and has been for some time. This relationship was not mentioned during the hearing in December by either party. The Official Solicitor was somewhat concerned about this and the possible effect of this relationship on the girls. CB questioned the propriety of this being mentioned to the girls. The Official Solicitor was quite entitled to raise this issue and indeed right to do so. However, having considered the matter in the overall context of the case, I do not think this relationship is, at this time, a matter which is relevant to the decision which has to be made. In any event the relationship ended some time ago.

[58] On 23 March 2001, the respondent lodged an application under Article 7(1)(a) of the Children (Northern Ireland) Order 1995, for an order that he shall have

parental responsibility for his children. There is no opposition to this application. Article 7(1)(a) states –

“7.-(1) Where a child’s father and mother were not married to each other at the time of his birth –

- (a) the court may, on the application of the father, order that he shall have parental responsibility for the child.”

[59] Parental responsibility is defined in Article 6 –

“Article 6(1). In this Order “parental responsibility” means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.”

[60] Under Article 7 of the Children (Northern Ireland) Order 1995 the court has a discretion whether or not to order that a father shall have parental responsibility for his child. How and in what circumstances should that discretion be exercised? The welfare of the child must be a relevant consideration. Several cases in England and Wales suggest that the paramountcy principle in Article 3(1) applies, that is, that the welfare of the child is the court’s paramount consideration. For my part, I doubt very much whether a court, when considering whether or not to make a parental responsibility order, is determining any question with respect to the upbringing of a child. Three factors are relevant:

- (i) the degree of commitment by the father towards the child;
- (ii) the degree of attachment between the father and the child; and
- (iii) the reasons why the father is applying.

[61] It seems to me the most significant factor of the three is the degree of commitment shown by the father towards his children. The relationship between putative fathers and their children covers a wide spectrum. On one side are fathers who live with the children’s mother and the children in a normal family-type relationship and, on the other side, are putative fathers who are absent and take no interest in their children whatsoever, and there are many states in between. In determining any application for parental responsibility, the court will wish to consider the relationship between child and parent and whether the parent is concerned with and about his child. In *Re C & V* 1998 1 FLR 392, the nature of a parental responsibility order was considered and how it is distinguished from a contact order. Ward LJ at p 396 said:

“These are wholly separate applications and it should be understood by now that a parental responsibility order is one designed not to do more than confer on the natural father the status of fatherhood which a father would have when married to the mother. There is also a said failure to appreciate, when looking at the best interests of the child (which are paramount in this application , as elsewhere) that a child needs for its self-esteem to grow up, wherever it can, having a favourable positive image of an absent parent; and it is important that, wherever possible, the law should confer on a concerned father that stamp of approval because he has shown himself willing and anxious to pick up the responsibility of fatherhood and not to deny or avoid it.”

[62] Prior to AB’s death, the respondent lived with her and the children as a family unit, though it is correct to observe he was often away on business. At this time, he had a significant relationship with his children, even though it has been subjected to considerable strain over the last twelve months or more. Undoubtedly, he is a concerned father who is interested in his children and their welfare and, accordingly, is entitled to parental responsibility for the girls in accordance with our law. I grant his application for a parental responsibility order under Article 7(1)(a) of the Children (Northern Ireland) Order 1995.

[63] As I have already indicated, the more difficult question is where and with whom the girls should reside. I approach this issue not only on the basis that the respondent is their natural father but, also, in the knowledge that now he has parental responsibility for them in this jurisdiction. CB remains their half-sister with a deep and caring relationship with them and a justifiable interest in their future. What approach should the court adopt in private law proceedings, when there is disagreement over where and with whom children should live on the death of their mother who was unmarried? In *J v C* (the Spanish Boy case) 1969 1 AER 788, the House of Lords considered the approach to be adopted when the natural parents of a young boy wished him to be returned to them in Spain after he had been brought up in England for some time. In his speech, Lord MacDermott quoted with approval the words of Fitzgibbon LJ in *Re O’Hara* 1900 2 IR 232 when he said:

“In exercising the jurisdiction to control or to ignore the parental right the court must act cautiously, not as if it were a private person acting with regard to his own child and acting in opposition to the parent only when judicially satisfied that the welfare of the child requires that the parental right should be suspended or superseded.”

[64] In *Re KD (A Minor) (Ward: Termination of Access)* 1988 AC 806, Lord Templeman said at p 812:

“The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child’s moral and physical health are not endangered. Public authorities cannot improve on nature. Public authorities exercise a supervisory role and interfere to rescue a child when the parental tie is broken by abuse or separation. In terms of the English rule the court decides whether and to what extent the welfare of the child requires that the child should be protected against harm caused by the parent, including harm which could be caused by the resumption of parental care after separation has broken the parental tie. In terms of Convention rule the court decides whether and to what extent the child’s health or morals require protection from the parent and whether and to what extent the family life of parent and child has been supplanted by some other relationship which has become the essential family life for the child.”

[65] In *Re K (A Minor) (Custody)* [1990] 2 FLR 64, the court was concerned with rival claims for the custody of a 4½-year-old boy between his father and his aunt and uncle, the mother having died. In his judgment, Fox LJ said at 68B:

“The question was not where would R get the better home? The question was: has it been demonstrated that the welfare of the child positively demanded the displacement of the parental right. The word ‘right’ is not really accurate insofar as it might connote something in the nature of a property right (which it is not) but it will serve for present purposes. The ‘right’, if there is one, is more that of the child.”

Waite J said at p 70:

“The judge correctly referred to *Re KD* ... for the guidance of principle which it afforded to him in making that choice. The principle is that the court in wardship will not act in opposition to a natural parent unless judicially satisfied that the child’s welfare requires that the parental rights should be suspended or superseded. The speeches in the House of Lords make it plain that the term ‘parental right’ is not there used in any proprietary sense, but rather as the right of every child, as part of its general welfare, to have the ties of nature maintained wherever possible with the parents who give it life.”

[66] In *Re H (A Minor) (Custody: Interim Care and Control)* 1991 2 FLR 109, Lord Donaldson MR said at p 112 –

“So it is not a case of parental right opposed to the interests of the child, with an assumption that parental right prevails unless there are strong reasons in terms of the interests of the child. It is the same test which is being applied, the welfare of the child. And all that *Re K* is saying, as I understand it, is that of course there is a strong supposition that, other things being equal, it is in the interests of the child that [that child] shall remain with its natural parent.”

[67] These judgments were considered by Balcombe LJ in *Re W (A Minor) (Residence Order)* [1993] 2 FLR 625. The case concerned a dispute between a father and maternal grandparents over residence of a 7-year-old boy. He referred (at p 631) to the speech of Lord Templeman in *Re KD* supra to which I have referred and the passage from Lord Donaldson MR in *Re H* supra and said:

“For my part I agree wholeheartedly with what Lord Donaldson says there, but I hope that it may be possible that this divergence of views, if such it really is, can finally be stilled. I would repeat what Lord Donaldson says. It is the welfare of the child that is the test, but of course there is a strong supposition that, other things being equal, it is in the interests of the child that it shall remain with its natural parents, but that has to give way to particular needs in particular situations.”

[68] All of these passages were considered again in *Re D (Care: Natural Parent Presumption)* 1999 1 FLR 134. In that case a local authority sought care orders in respect of the mother’s three children. She accepted that the threshold criteria were met. The care plan proposed that the two eldest children be cared for by their maternal grandmother and her husband and that their half-brother should be cared for by his father. The judge ordered that the half-brother should be placed with the grandmother and his half siblings. The father appealed. In giving the judgement of the court, Sumner J said at p 141 –

“Having at the outset correctly stated the guiding principle, the judge proceeded, however in the remainder of the judgment despite repeating that principle as though the question before him was which claimant would provide the better home. The question he ought to have been asking was whether there are any compelling factors which require him

to override the prima facie right of the child to an upbringing by its surviving natural parent.

[69] Mr Long QC submitted that, on that line of authority, the question for the court in this case is – is there, in the circumstances of the case, a factor so compelling to justify overriding the parental right? He submitted that the expressed wishes of the girls should not be such a compelling reason. He submitted, also, that if the views expressed by the Official Solicitor in her latest report were correct then they brought into question the weight to be attached to the girls' views and also the suitability of CB to care for them. For my part, I do not doubt her ability or suitability to care for them.

[70] Miss McGreenera QC sought to distinguish some of these cases on the ground that they were public law cases, and the choice was between a parent and local authority control. She submitted that CB had now supplanted the respondent in his role as natural parent and that the children were now attached to and dependent upon her.

[71] At the earlier hearing, I was struck by the depth of feeling expressed by the girls towards being with CB and, also, the implicit rejection of their father. The latter is explained by the limited role he played in their lives when their mother was alive, the former by the loss of their common mother and sisterly love and affection. To have ordered their return at that time would have had serious and irreparable consequences and made an already difficult situation many times worse. It is a matter of regret that little has changed but sufficient time has now passed for some finality to be brought to these proceedings, which hopefully will ease the obvious tensions.

[72] The respondent argues that the girls are Far Eastern in origin, that is where they have been brought up and schooled, he is their natural father, and they should be with him. Their mother's presence apart they appear to have few roots in either Burma or Singapore or much relationship with his family or friends. It is clear that they had, and continue to have, a very close relationship with their mother's family in Northern Ireland. They have settled in her family's environment with apparent ease, despite the circumstances. The implicit rejection of their father as carer is an indication of the limited role he played in their lives hitherto and a pointer to the role he might play in the future, despite his protestations and his arrangements to have more time available for them. He remains a committed businessman with a strong work ethic, and I have reservations about his ability or his desire to change his lifestyle significantly. He is probably used to getting his own way and feels he is being thwarted in relation to his children and is now determined that CB should not succeed. I doubt his understanding of all the needs of his two girls. If the girls return to Singapore, they may well be cared for in the main by nannies or suchlike. He is entitled to do so but it is a factor for consideration. The arrival of the Burmese nanny late on Sunday night before the final hearing on Monday tended to confirm that view. I am concerned that he would play only a limited role in their lives. That

role would probably be greater than hitherto, but would it be sufficient? There is no reason to believe that the girls could not survive such a lifestyle. But they need more than the physical requirements of life. They have emotional needs that are clearly met by CB and there is little evidence that he has met these to date. If he had a significant relationship with them prior to their mother's death, I would have expected them to turn to him at some stage and certainly by now. They have not done so, and I regard that as significant.

[73] It is every parent's right and duty to raise their children as well as to decide where they should live. Whether in public or private law cases, that right should only be interfered with for good and compelling reason. Do such reasons exist in this case? Children require stability and certainty in their lives particularly as they approach the age when they are required to sit examinations in preparation for later life. Children do suffer bereavements which require adjustments in their lives whether temporary or permanent. But some degree of normality should and must return eventually.

[74] If I make a residence order in favour of CB, there is a risk that the relationship between the children and their father may break down completely. He might, though hopefully he would not, cut them off financially. They would lose contact with their ethnic and cultural background and the Far Eastern part of their family.

[75] If I decline to make a residence order in favour of CB, the respondent will have sole parental responsibility. He could decide to take them to Singapore tomorrow. The girls may rebel and not go with him, or alternatively they may go but be resentful and, in either case, their relationship with their father will be threatened. He may not allow them to visit Northern Ireland and their relatives here. He may deny them access to CB which would be particularly harmful. She is a very important person in their lives and has played a crucial role over the past 14 months. I suspect she has a much greater insight into what the girls need and the difficulties of this case than has been acknowledged.

[76] Mistakes have been made by both parties and, for the girl's sake and in their best interests, a speedy and substantial rapprochement is required. I am concerned that the respondent, to date, has not shown that generosity of spirit which this situation requires.

[77] The task for the court is to weigh up those alternatives and decide what is best for the girls. Both parties are capable of providing for the girls physical and educational needs. CB is capable of providing for their emotional needs, but the respondent would have to make improvements in that area though he should be capable of it. The girls have expressed their views, and the court must have regard to them, but their views are only one factor in a very difficult situation. Their views have to be considered in the light of their ages and understanding. They are both intelligent and indeed strong willed but are only 13 years and 7 months and 12 years and 7 months, as of today.

[78] In view of those strong views and in the knowledge of the tragedy that befell them and indeed CB, it was right that they should spend substantial time where they found comfort in their grief. But life moves on and it is now time to consider their long-term future. It is now time for them to be with their father, who has also suffered through the loss of AB and who requires the comfort his children can bring him. He has stated, and I must accept, that he will not force them to do something they do not wish to do.

[79] In granting the respondent parental responsibility, it is for him to decide where the girls should live. I do not consider it is appropriate that the court should make that decision for him. I could impose restrictions on the removal of the girls from this jurisdiction, but that may create further difficulties. In so deciding, I am not persuaded that the girl's wishes in themselves can override the parental right and presumption. To the girl's wishes may be added the very great comfort and benefit which they receive from living with CB. Combined they constitute a formidable argument against the parental right but in the case of a half-sister, as opposed to a parent, are insufficient to overcome that parental right. It will be for the respondent to persuade the girls that to be with him is in their best interests. CB will require to defer to his views, but he will need her assistance, in both working out a plan for the future and in implementing it. The girls must remain in Northern Ireland to complete the academic year.

[80] I will discharge the Interim Residence Order made in January and make a further Interim Residence Order in favour of CB to expire not later than 20 July 2001.

[81] Parental responsibility brings both rights and duties. Should the girls wish to remain here, and the respondent agrees, he will be required to put in place proper financial arrangements for their upkeep. If the arrangements involve CB, then she will require to be included in the financial arrangements and her position fully recognised both in social and financial terms.

[82] If the girls return to Singapore, it is important and in their best interests that they maintain contact with CB and their mother's family. To that end, I make a contact order in favour of CB of not less than six weeks per year. That should permit a month in the summer and one week at Christmas and Easter or such other arrangement as the parties may agree. That order is enforceable within the United Kingdom and within any country which is a signatory to the Hague Convention. I do not imagine the respondent wishes to be cocooned in the Far East. The respondent must restore his relationship with CB if only for the girls' sake. He owes her much more than his wealth could ever buy.