

Neutral Citation No: [2018] NIFam 10

Ref: McF10707

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 6/7/2018

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

—————
FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

18/064071

BETWEEN:

A FATHER

Applicant;

-and-

A MOTHER

Respondent.

—————
**IN THE MATTER OF TWO MALE CHILDREN WHO ARE AGED 10 ½ YEARS
AND 8 ½ YEARS OF AGE**

—————
HIS HONOUR JUDGE McFARLAND
RECORDER OF BELFAST sitting as a HIGH COURT JUDGE

[1] This is an application by a father to have his children made wards of court. It was originally an ex parte application, but the Master directed that it be listed as an inter partes hearing. On the hearing of the case on the 5 July 2018, I gave brief reasons why I was dismissing the application and now take the opportunity to set those reasons out in more detail. The title and content of this judgment preserve the anonymity of the children and the family and no report may be made of this judgment or these proceedings that could lead directly or indirectly to the identification of either child or their parents.

[2] The parties married in 2009 and separated in April 2018. Since then, there have been a number of hearings in the Family Proceedings Court and the Family Care Centre. The situation remains highly acrimonious. An *ex parte* non-molestation and occupation order was obtained by the mother on 24 May 2018, although this was later revoked on 13 June 2018 after a full hearing. On the 15 June 2018 the court made a joint residence order in relation to the children with the matter left to the parents to resolve a schedule of residence and contact in light of their respective work schedules. The mother appealed that order and a stay of the order was refused pending the outcome of the appeal. The mother's appeal was then dismissed on the 28 June 2018 with the matter being referred back to the Family Proceedings Court. The father put forward a proposed schedule at the hearing on the 29 June 2018, but there were no proposals from the mother. The Family Proceedings Court was unable to deal with the case on that day and the case has been listed for 24 July 2018. The order of the 15 June 2018 remains unimplemented. I understand the mother is seeking to review its contents.

[3] There was an unsavoury incident at a Shopping Centre on the 30 June 2018 when the obvious hostility between the parents, acted out, in part, through agents, was witnessed by the children and the public at large. There has been police involvement and the Gateway Team have been alerted. The father has advised the court that the mother has written a letter of apology and has been issued with a warning by the police.

[4] The father seeks this court to exercise its inherent jurisdiction and to make the children wards of court.

[5] The wardship jurisdiction of the court is steeped in the history and literature of these islands. Legal guardianship of a child can be vested in the court as a means of securing the safety and protection of the child. It is a power derived from the Crown's duty as *parens patriae* (or parent of the nation) to protect the subjects of the state, and particularly those unable to look after themselves.

[6] The proposals of the Law Commission (No. 172) - Family Law: Review of Child Law: Guardianship and Custody resulted in the major reform of the legislation relating to children, and in this jurisdiction to the Children (NI) Order 1995. The Law Commission at 4.35 had noted that in many cases, wardship was invoked, not because of any need for the court to exercise continuing parental responsibility, but because no other proceedings were available. The stated major objective of the legislation was to reduce the need to resort to the wardship jurisdiction of this court.

[7] In Re T (a minor) [1993] 4 All ER 518 Waite LJ at 524 (d and e), stated that the court's undoubted discretion to allow wardship proceedings to go forward in a suitable case is subject to a clear duty in loyalty to the scheme and purpose of the Children Act 1989, to permit recourse to wardship only when it becomes apparent to the judge that the matter cannot be resolved under the provisions of the Children Act

in a way which secures the best interests of the child, or where the child's person is in a state of jeopardy or where the court's functions needed to be secured from the effects, potentially injurious to the child, of external influences (such as intrusive publicity).

[8] Waite LJ referred to the retention of the wardship jurisdiction when the Children Act provisions were unable to secure the best interests of the child. This echoes the position held in relation to public law proceedings. Although the wardship jurisdiction has now been severely restricted in the context of public law proceedings by Article 173 of the Children (NI) Order 1995, the courts had always recognised that the inherent jurisdiction had to be considered by taking into account any statutory regime that was available. Lord Wilberforce in A -v- Liverpool City Council [1982] AC 363 at 373 (b and c) summarised the position in the following terms -

"... the inherent jurisdiction of the High Court is not taken away. Any child, whether under care or not, may be made a ward of court... But in some instances there may be an area of concern to which the powers of the local authority, limited as they are by statute, do not extend.... The court's general inherent power is always available to fill gaps or to supplement the powers of the local authority."

[9] A recent example of the court exercising its wardship jurisdiction was by Hedley J in AT -v- FS [2011] EWHC 1608. He acknowledged at [22] that the jurisdiction was unusual but remained permissible where the needs of the child so require within a private law context. He indicated his reasons for exercising the jurisdiction in the AT case in the following terms -

"In the end I have concluded that this is a case where the court ought to retain within Wardship. My reasons are briefly these: First of all, it is case in which (as I have indicated) the exercise of parental responsibility has been effectively abrogated by incessant conflict; secondly, I formed a clear view in listening to this case that a residence order has assumed titanic status in the minds of the parties. The granting of a residence order to either or even both of them is likely to be unhelpful to the future long-term care of H and because of the unusual (indeed, almost unique) need in this case for the court to exercise control through detailed provisions of its order. The consequences of determining that this case should remain in Wardship is that care and control is in the gift of the court and parental responsibility rests in the court, save insofar as it is prepared to delegate its exercise to the parents. In all the circumstances, I have concluded that this is a case which

should (for the time being at least) be continued in Wardship."

[10] Applying the test suggested by Waite LJ in Re T, the critical questions to be answered are – First, can the welfare of the children be best secured under the provisions of the Children (NI) Order 1995? And secondly, are the children in such a state of jeopardy that the immediate supervisory role of the court is required?

[11] The Children (NI) Order 1995 provides the court with a range of powers in relation to the making of orders which can regulate the residence of the children, and the contact that they have with the absent parent. It can make orders requiring or prohibiting either parent to do, or not do, certain acts. To assist it, it can require a Health and Social Care Trust to provide a report into the general welfare of the children, and should there be concerns that the situation of the children was such that they were suffering significant harm, or were likely to suffer such harm, and the court considers that it may be appropriate to make a supervision or care order in respect of the children, it can invite a Health and Social Care Trust to undertake an investigation into the children's circumstances. These are very wide powers. The case is already before the courts and orders have already been made.

[12] Although the Family Proceedings Court lacks powers to enforce its orders through civil contempt proceedings, the Family Care Centre has such powers and the case could be easily transferred should those powers be considered necessary.

[13] There is no evidence placed before this court to suggest that the best interests of the children cannot be secured by the ongoing proceedings and the powers of the lower courts to obtain reports, require investigations, make orders and to enforce those orders. There are no gaps within the Children Order provisions that need to be filled and no powers available to the courts under the Order that need to be supplemented.

[14] There is also no evidence to suggest that either child is in a state of jeopardy. Like many children, they are caught up in the conflict between their parents, and appear to have been exposed to some of the issues raised by the conflict. This is unfortunate, and although on the father's evidence the children appeared to be distressed during the shopping centre incident, it could not be said that they are in a state of jeopardy, that would require the court to contemplate a wardship order, the effect of which would be to give the court an immediate and continuing supervisory function over the children.

[15] Such a supervisory function over the children is not required in this case and the application is dismissed.

[16] There will be no order as to costs between the parties, and the mother's costs will be subject to a taxation order as she is in receipt of legal aid.