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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

Between:

A GRANDMOTHER

Applicant

v

A MOTHER

Respondent

IN THE MATTER OF A FEMALE CHILD GE AGED 4 YEARS

Ms B Cleland (instructed by the Elliott-Trainor Partnership solicitors) for the Grandmother

McFARLAND J

Introduction

[1] The grandmother has applied for a residence order in respect of the child who I will call GE, a randomly chosen cipher. The mother has not engaged with the proceedings, but she has written an email stating that she supports the application. The father does not hold parental responsibility for the child as he is not married to the mother and is not named on the child's birth certificate. He has not sought to intervene or to be represented. The local Health and Social Care Trust ("the Trust") have had an active role in the child's life and have facilitated the placement of the child with the grandmother because of the ongoing difficulties that both the mother and father have. The Trust supports the application but has not sought to intervene in these proceedings.

[2] I heard the application on 7 November 2023 and at the conclusion of the hearing I gave a short *ex tempore* judgment granting the residence order. I indicated that I would deliver a written judgment at a later stage, and this is that judgment.

[3] The two issues before the court are whether the court has jurisdiction and, if it does, whether it should make the residence order.

Jurisdiction

[4] GE lives with the grandmother in a border county in the Republic of Ireland ("R of I"). The grandmother has lived there all her life. The mother was brought up there but moved to a border county in Northern Ireland ("NI"). The father lives in that county in NI.

[5] Section 19 of the Family Law Act 1986 ("the 1986 Act") states that a court in NI cannot make a "Part I Order" (defined in section 1(c) as including a residence order) unless it has jurisdiction under the Hague Convention 1996 ("the Convention") or the Convention does not apply and at the "relevant date" (defined by section 24(c)(i) to be the date of the application - 13 March 2023) the child was habitually resident in NI.

[6] Consideration of jurisdiction will be based on the child's habitual residence under both the Convention and the 1986 Act but it is necessary to consider the Convention jurisdiction first.

[7] An ongoing issue of concern relating to the Convention is the question as to what date the court should consider when assessing the habitual residence of the child. Is it the date of the issue of proceedings or the date of the hearing?

[8] The concern has been more focussed on public law matters rather than private law matters. These are often referred to as Part IV Children Act 1989 orders ("Part IV CA orders") in England and Wales and Part V Children (NI) Order 1995 orders ("Part V CO orders") in NI. Although section 24(c)(i) provides some assistance with the definition for the term 'relevant date' in section 19(1)(b)(ii) when a court is considering the habitual residence of a child after it has determined that the Convention does not apply, there is no such interpretative assistance in the Hague Convention which remains silent on the issue.

[9] In January 2022 this court, in the Part V CO case of *Re LS* [2022] NIFam 9, determined that the relevant date should be the date of the hearing. That decision was in a group of first instance decision by courts throughout the United Kingdom which concluded that the date of hearing as the relevant date. There were however other decisions opting for the date of the issue of proceedings as being the relevant date. The problem arose because the Convention (unlike Brussels II which regulated inter-state jurisdiction within the European Union) was silent on the issue, and the Convention (again unlike Brussels II) did not apply the doctrine of *perpetuatio fori* leaving it open for a country to lose jurisdiction should the habitual residence of the child change during the course of the proceedings.

London Borough of Hackney v P

[10] Some clarity has now been brought by the judgment of Moylan LJ in *London Borough of Hackney v P* [2023] EWCA Civ 1213. It concerned a Part IV CA order. In this wide-ranging judgment Moylan LJ reviewed the existing case-law and came to the following conclusions:

(a) The Convention should be interpreted and applied purposively in a manner which supports the protection of children and their welfare interests ([86]);

(b) A court must determine whether it has jurisdiction and the basis of its jurisdiction at the outset of proceedings. A court cannot simply postpone that decision until a significantly later hearing. ([87]);

(c) A court needs to determine what jurisdiction it has to make an order as it needs to know the nature and extent of its powers, if any ([88]);

(d) Delay is always contrary to the best interests of a child. The longer the determination of any jurisdictional issue is delayed, the more established the child's situation becomes. It would be wrong for any delay to be the cause of the jurisdictional picture changing or, even, becoming determinative of that issue ([90]). A party may even seek to delay proceedings or seek to take advantage of delay to procure a jurisdictional advantage. ([89])

[11] In an examination of the architecture of the Convention, Moylan LJ set out the following propositions concerning its practical application:

(a) The court should first decide where the child is habitually resident ([94]);

(b) Pending a determination on habitual residence, a court can make orders under Article 11 based on the child's presence in the United Kingdom. Article 11 provides that the state in whose territory a child is present, in all cases of urgency, has jurisdiction to take any necessary measures ([96]);

(c) If the court determines that the child is present in the United Kingdom but habitually resident in a contracting state, then that state has substantive jurisdiction, although if the child has a substantial connection with the United Kingdom (see Article 8(2)) a request could be made to the state with jurisdiction under Article 9 for authorisation to exercise jurisdiction ([95]);

(d) If the court determines that the child is habitually resident in the United Kingdom then the courts here have substantive jurisdiction ([95]);

(e) If the court determines that the child is habitually resident in a non-contracting state, the Convention does not provide for substantive jurisdiction, and therefore the court can turn to domestic law as an alternative source of jurisdiction ([105]) but a court might decide to make a summary

return order should it consider that it would be more appropriate for proceedings to take place in that non-contracting state ([110]).

[12] In dealing with the relevant date for the determination of habitual residence, it was further noted that unlike Brussels II, there was nothing in the Convention and the explanatory documents issued with it, which addresses this issue. Despite this, Moylan LJ considered that the need for both clarity and certainty, "plainly required" jurisdiction to be determined by reference to the date on which proceedings were commenced. This is the date on which the court's jurisdiction was invoked. It also provides a benchmark against which any future changes can be measured ([113]).

[13] Earlier in the judgment, Moylan LJ referred to the private law position and the 1986 Act (described as the FLA) which has identical provisions relating to England and Wales as it does for NI at [63]:

> "The FLA 1986, as referred to above, only deals with private law proceedings. However, of relevance is that fact that it gives the court alternative grounds of jurisdiction in the event that, as set out in s.2(1)(b) and s.2(3)(b), the 1996 Convention "does not apply." These alternative grounds include the child's presence in England and Wales. I would also note that the relevant date for the purposes of determining jurisdiction, under s.7 of the FLA 1996, is the date of the application …"

[14] He then went on to deal with the loss or acquisition of jurisdiction during the course of proceedings. A court must retain jurisdiction at the date of the final substantive hearing.

[15] Reference was made to the CJEU decision of *CC v VO* [2022] 2 FLR 1175. It is not directly applicable as the Convention is not an EU instrument. It is of importance because of the advantage that it is binding on EU states, and should the United Kingdom consider it to be a persuasive precedent it would mean a consistent approach with many of the states, including the R of I, involved in the vast majority of cases involving children and international issues before our courts. At [44] the CJEU stated:

> "[A] member state that is hearing a dispute relating to parental responsibility does not retain jurisdiction to rule on that dispute under Art 8(1)… where the habitual residence of the child in question has been lawfully transferred during the proceedings to the territory of a third state that is a party to the [Convention]."

[16] A distinction is made between contracting and non-contracting states. Should the child become habitually resident in a contracting state then that state acquires jurisdiction under Article 5. If it is in a non-contracting state, then that state does not

acquire jurisdiction and that the United Kingdom can retain jurisdiction if permitted under domestic law ([117]).

[17] In the case of a child not having habitual residence at the commencement of proceedings, but acquiring it during the course of the proceedings, Moylan LJ preferred not to give guidance on what is a potentially complex problem, and left it on the basis that each case would turn on its individual facts ([118]–[120]).

[18] An additional complexity could arise if a child had no habitual residence, but Moylan LJ declined to address that situation in the judgment ([95]).

[19] A summary of the conclusions was set out at [125] in the following terms:

> "(i) the 1996 Convention applies to proceedings for an order under Part [V CO];
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> (ii) the court must determine the issue of jurisdiction at the outset of proceedings by reference to the date on which the proceedings were commenced;
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> (iii) jurisdiction under the 1996 Convention can be lost during the course of proceedings, if it was based on habitual residence and the child has ceased to be habitually resident in [NI]. Accordingly, the court must be satisfied that it retains jurisdiction at the final hearing;
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> (iv) jurisdiction is acquired under Article 5 from the date on which a child becomes habitually resident in [NI]; the effect of this on existing proceedings will depend on the circumstances of the case;
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> (v) the court in [NI] will likely have jurisdiction to make interim orders under Part [V] under Article 11 when the child is habitually resident in a Contracting State;
>
> (vi) the court in [NI] will likely have jurisdiction to make interim orders under Part [V] under Article 11 and will also have substantive jurisdiction based on a child's presence here when the child is habitually resident in a non-Contracting State."

Application of London Borough of Hackney v P

[20] Although dealing with a public law matter it would be entirely appropriate for the same interpretation to apply to private law matters. The Convention equally

applies to private law matters (see Article 2(b) "The measures … may deal with rights of custody, including … the right to determine the child's place of residence, as well as rights of access …") and its application is formally incorporated into United Kingdom law by virtue of the 1986 Act.

[21] As a judgment of the English Court of Appeal, *Hackney* would fall into the category of being highly persuasive but not binding. I consider that it is important that given the detailed analysis of the Convention and the case-law within the judgment, and in an effort to ensure that NI is aligned with England & Wales in its interpretation of the application of the Convention (and the Family Law Act 1986), we should follow *Hackney* and in future determine the issue of primary jurisdiction as at the date of the issue of proceedings.

[22] The principle of uniform interpretation of identically worded provisions is well established. Ward LJ in *Secretary of State for Work and Pensions v Deane* [2010] EWCA Civ 699 stated at [26]:

> "I am satisfied that we are not obliged to follow decisions of the Northern Ireland Court of Appeal, but we must accord them the greatest respect. Where the decision relates to a statutory requirement which applies or which is the same as that which applies in England and Wales, then we ought to follow that Court in order to prevent the wholly undesirable situation arising of identically worded legislation on the other side of the Irish Sea (or the other side of the Tweed) being applied in inconsistent ways. The same approach as we adopt for cases of the Court of Session in Scotland should be followed in the case of Northern Ireland."

[23] In *Re OM* [2021] NIFam 16 in a case involving identical statutory language in the Children (NI) Order and the Children Act I adopted a similar approach stating at [42] as follows:

> "English precedent has always been regarded as highly persuasive in this jurisdiction, although there is no obligation to follow it (see for example *Re Connelly's Application* [2011] NIQB 62). However, when the precedent has been established by what is a formidable quintet of judges of the standing of Munby, King, Floyd and Moylan LLJ and Cobb J, and when they have interpreted identical, or near-identical, legislation, this court should be slow to depart from it, unless there are compelling reasons."

I consider that a similar approach is required in the interpretation of the Convention.

[24] Before leaving this issue, I would add that in the case of a private law matter, when a court determines that the child is habitually resident in another contracting state, the power to take interim measures under Article 11 may be more limited than in cases involving public law issues. Public law cases, by definition, will tend to relate to potential harm to the child. Article 11 refers to cases of urgency and the need to take necessary measures for protection. This may not arise to the same degree in private law matters when the need for urgency and protection from harm is likely to be greatly diminished. It goes without saying that this will again reinforce the need to deal with the issue of jurisdiction at a very early stage in the proceedings.

[25] For further clarity, particularly in the context of the appropriate tier for consideration of these issues, I would refer to the comments in the judgment of *Re CX* [2022] NIFam 14:

> "[15] In the circumstances the Family Proceedings Court was wrong to consider it had no jurisdiction. It is also most unfortunate that the court waited over 10 months to decline jurisdiction despite, in the interim, accepting jurisdiction by making a parental responsibility order, ordering an Article 4 report and making an interim contact order. If a court considers it has no jurisdiction then it should rule on that point without delay.
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> [16] There was no reason at all for this case to have been transferred by the Family Proceedings Court and then by the Family Care Centre.
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> [17] Keegan LCJ recently dealt with the issue of transfer of family proceedings in *Re E & F* [2021] NIFam 48. Judges considering transferring proceedings should take the opportunity to refer to that judgment. The starting point for transfer is Article 5 of the Children (Allocation of Proceedings) Order (Northern Ireland) 1996. The proceedings should be exceptionally grave, important or complex and in particular—
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> (a) because of complicated or conflicting evidence about the child's physical or moral well-being or about other matters relating to the child's welfare;
>
> (b) because of the number of parties;
>
> (c) because of a conflict of law with another jurisdiction;
>
> (d) because of some novel or difficult point of law; or

(e) because of some question of general public interest."

Although Keegan LCJ stated at para [16] that cases with an international element could be considered for transfer, this was not a reference to every cross-frontier case and Article 5 (1)(c) is the context for that statement, namely cases involving a conflict of law with another jurisdiction."

Habitual residence

[26] The relevant date is therefore 20 March 2023 to determine whether this court has jurisdiction based on the child's habitual residence at that date. Should it have jurisdiction, it can then proceed to consider whether to make the residence order, but before finalising that order it needs to satisfy itself that it has retained jurisdiction.

[27] Shortly before the birth of GE, the mother separated from the father and came back to live with the grandmother in the R of I. GE was born in the R of I. The mother then returned to NI when GE was two months old to resume her relationship with the father and residence in NI.

[28] Both the mother and father have significant substance misuse issues and social services in NI became involved. The mother then came back to the R of I with the child and TUSLA also became involved after a GP referral. There followed periods in NI and the R of I as the mother moved back and forward with GE.

[29] In February 2023 the child was living with the mother in NI. The grandmother was contacted by the Trust asking if she would assist in the care of GE. She agreed and the child came to live with her in the R of I, this time without the mother. There was a minor issue concerning whether the case should transfer from the Trust to TUSLA and, by agreement, the Trust retained the primary role. At a child protection conference on 12 February 2023 it was decided that GE should remain living with the grandmother. This had the full agreement of the mother. It is the court's understanding that had the mother not agreed with this arrangement it would have been highly likely that public law proceedings would have issued in NI. The Trust advised the grandmother that she should consider issuing proceedings to obtain a residence order and she did so on 20 March 2023.

[30] GE has lived since February 2023 in the R of I with her grandmother. The Trust continue to have an active involvement and GE remains on the child protection register, although the court has been advised that should a residence order be granted it is likely that the child will be removed from the register. Child benefit is still claimed for the child by her mother in NI. GE is registered with a GP in NI and has been referred to a speech therapist in NI. She is not registered with a GP in the R of I, does not have a health card in the R of I and does not have health insurance. Some occasional medical advice has been obtained from a GP in the R of I who is a family friend. She attends a pre-school group in the R of I. Any contact,

albeit limited, that the child has with both of her parents takes place in NI.

[31] Determination of habitual residence is a fact-finding exercise and will focus on the degree of integration by the child in the social and family environment. In *Re LS* I set out some of the factors that should be taken into consideration (see [27]).

[32] The unusual aspect of this case is that with the involvement of the Trust the child has been placed outside the jurisdiction of NI by the mother when exercising her responsibility on the basis that without her doing so Part V CO proceedings would commence. Although the grandmother carries out full caring duties, she does not hold parental responsibility. Had the Trust been compelled to issue proceedings it is likely that interim care provisions would have placed parental responsibility with it with the current arrangements part of a care plan under any interim care order.

[33] In *Re B, C, D and E* [2007] EWHC 820, the children were in the care of the local authority and were placed with a maternal aunt in Canada. Sumner J at [27] and [28] was of the view that the children had never acquired habitual residence in Canada as the caring adult, the maternal aunt, did not have parental responsibility:

> [27] I am satisfied the 4 children have never acquired habitual residence in Canada. Firstly the aunt has never had parental responsibility for them. Whilst she provides them with a home, their time in Canada has always been at the behest of the local authority. It alone determined when it began, for how long it continues, and when it comes to an end. The children are dependent, not on the aunt to determine their residence, but upon the local authority. That in my view is determinative.
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> [28] It follows that the habitual residence in England never came to an end. There was no settled intention on the part of the local authority for the children to live in Canada. It was described at the time as an extended holiday. It was at best a hope that one day it might become a settled home for the children. But it could never be more than a hope as long as the right to stay in Canada remained and remains dependent on both the local authority and the court.

[34] This approach accords with the speech of Lord Brandon in *Re J* [1990] 2 AC 562 as clarified by Balcombe LJ in *Re M* [1993] 1 FLR 495 at 500F:

> "I do not read [Lord Brandon's] words as intending to suggest that the habitual residence of a child is necessarily

> the same as that of a parent who alone has parental responsibility, notwithstanding that the child may have lived apart from that parent for a period which may have lasted for several years … All he was saying was that where a young child is in the physical care of a mother who alone has parental responsibility for the child, then normally the child's habitual residence will be the same as hers, since it is her will that determines the element of volition involved in the concept of habitual residence."

[35] At the time of the application in March 2023, discounting the brief periods spent by the mother and GE living with the grandmother in the R of I, GE had only lived for a period of about five weeks solely in the care of her grandmother in R of I. On the balance of probabilities I am satisfied that on 20 March 2023 she had not become sufficiently integrated into social and family life in that jurisdiction. I am therefore satisfied that she remained habitually resident in NI. This was in effect a quasi-public law situation and it was being managed by the Trust with the acquiescence of the mother who was the sole person with parental responsibility.

[36] There is no evidence before me to suggest that the authorities in the R of I would be better placed to assess the best interests of GE and I therefore decline to exercise any powers under Article 8 of the Convention.

[37] Before making any final order, the court must consider whether it still retains jurisdiction by revisiting the issue of the child's habitual residence at the date of hearing.

[38] That position is potentially different because of the nine months spent in the R of I with the grandmother. I have taken into account certain factors which I consider to be relevant. The grandmother still does not have parental responsibility. The current care plan for GE is that she live in the R of I with her grandmother. That is the care plan of the Trust which has been treating GE as a child in need under the provisions of the CO. It appears to have the support of the mother who at present has the sole parental responsibility for the child. It is not regarded as a permanent solution. Rehabilitation back into the mother's care would also be part of the care plan but given the mother's current presentation that is not likely in the near to mid-term.

[39] The placement is currently stable given the acquiescence of the mother. There is a degree of social integration in that the child attends pre-school nursery in the R of I, however she is not registered with a GP or for any medical or dental services in the R of I. Child benefit is paid in NI. Although there has been a degree of wider family and social integration in that the child will, no doubt, accompany her grandmother to the grandmother's family events and other suitable social engagements, any contact with GE and GE's immediate family continues to take place in NI.

[40] On the balance of probabilities, I consider that GE has not yet achieved the necessary degree of integration in the social and family environment of the R of I. In cases such as this with people living in the border counties there is a high level of fluidity in social and family life, which can make determination of habitual residence difficult, particularly when the notion of a person being habitually resident in two states is based on a "frail foundation" (see Munby J in *Marino* [2007] EWHC 2047 at [42]). The factors which I consider tip the balance would be that no adult in the R of I is exercising parental responsibility for her and the lack of the provision of medical services for the child in the R of I.

Residence order

[41] Unlike the determination of habitual residence, which is a matter of fact, whether the court makes a residence order is a welfare-based decision taking into account the welfare checklist (Article 3 CO).

[42] The Trust has carried out its own assessment and has formed the view that it is in the child's best interests that she resides with her grandmother. This has the support of the mother. That care plan has been in place for nine months and no major issue has arisen. The child is having her physical and social needs cared for to a high standard. The child is having contact with her mother and father.

[43] The court is conscious of the provisions of Article 3(5) CO and the need to identify how the welfare of the child would be promoted by the making of the order as opposed to making no order at all. The key factor is the lack of parental responsibility being exercised by the grandmother. She is not able to make these decisions and there is a need to refer, and defer, to the mother. To date this has not created a significant problem, but school commences next September and there is a need to sort out medical care issues. The residence order will also give the grandmother the psychological benefit with regard to her current responsibilities. The Trust have indicated that should a residence order be made, it does not feel there is an ongoing need to remain as actively involved in GE's life as it has to date.

[44] In all the circumstances I consider that it is in the GE's best interests that her grandmother be granted a residence order.

Conclusion

[45] This court had jurisdiction on 13 March 2023 when the proceedings were issued as GE was habitually resident in NI. It has retained jurisdiction as GE has remained habitually resident in NI to the date of hearing. It is in GE's best interests that a residence order be granted to her grandmother.