

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

RE ARTHUR (NON-MOLESTATION PROCEEDINGS BY A CHILD)

STEPHENS J

Introduction

[1] This judgment deals with an application dated 29 September 2008 under the Family Homes and Domestic Violence (Northern Ireland) Order 1998 for a Non-molestation Order. The application was brought by Arthur, by his mother and next friend, Sarah, against his father, George. The application related to an incident which is alleged to have occurred on 10 September 2008. On 1 October 2008 the Master granted the applicant leave to proceed ex parte and made a Non-molestation Order.

[2] I have anonymised this judgment. The names used are not the real names of any of the individuals involved. Nothing should be reported which would identify Arthur or any member of his extended family. The parties are requested to consider the terms of this judgment and to inform the Office of Care and Protection in writing within one week as to whether there is any reason why the judgment should not be published on the Court Service website or as to whether it requires any further anonymisation prior to publication. If the Office is not so informed within that timescale then it will be submitted to the Library for publication in its present form.

Family background and the alleged incident

[3] George and Sarah have been divorced for nearly a decade. Arthur lives with Sarah in town A, at least 20 miles from George's home in town

B. Arthur's paternal grandfather also lives in town B. Arthur had a good relationship with his paternal grandfather.

[4] The statement grounding the application was dated 29 September 2008, 19 days after the alleged incident on 10 September 2008. It was expressed to be the statement of Arthur by Sarah, his mother and next friend. It was written in the first person as if it was the statement of Arthur. However, it was not signed by him but rather was signed by Sarah. In that statement the Court was informed, in effect by Sarah, that for two weeks before 10 September 2008, Arthur had been staying with George in town B. An argument had occurred between them on 10 September 2008. That this involved physical violence including an attempt by George to strangle Arthur. It was recognised in the statement that there was no previous history of violence by George towards Arthur and accordingly that this was an isolated incident. As is apparent the allegation was of a high level of physical violence.

[5] On 9 December 2008, George filed a replying affidavit in which he refuted the contents of the statement grounding the ex parte application. George expressly articulated his belief that Sarah was responsible for the contents of that statement. He further implied that Sarah did not support his attempts to maintain a relationship with his children after their divorce. He went on to state that he had not assaulted his son and the suggestion that he tried to strangle him was obscene. He accepted that there had been a verbal altercation between himself and Arthur. He stated that he loved his son and that he wished for the Non-molestation Order to be lifted so that he could attempt to repair their relationship.

Family proceedings court

[6] Sarah could have applied for a non-molestation order prohibiting George from molesting Arthur a relevant child, see Article 20(1) of the Family Homes and Domestic Violence (Northern Ireland) Order 1998. Those proceedings in her name to obtain an order to protect her child, would have been commenced in the Family Proceedings Court if they had been combined with an application under Article 8 of the Children (Northern Ireland) Order 1995 for a no direct contact order. Alternatively if there were no other family proceedings they would have been commenced in a domestic proceedings court.

Police investigation and the continuation of the non molestation proceedings

[7] There was a police investigation which resulted in a file being sent to the Public Prosecution Service. On 19 August 2009 the Public

Prosecution Service stated that they had decided not to prosecute George in relation to the alleged incident on 10 September 2008. As can be seen the police investigation and the referral of the file to the Public Prosecution Service took over 1 year. This was a factor influencing the decision to delay a substantive hearing of the non molestation application which has had the effect of interrupting contact between Arthur and George and also between Arthur and his paternal grandfather for the same period of time. If the proceedings had been constituted in such a way as to focus on the question of contact between Arthur, George and Arthur's paternal grandfather then it would have been unlikely that such disruption to contact would have occurred for such an extensive period of time.

[8] Whilst the police investigations were being brought to a conclusion the interim Non-molestation Orders had been renewed by the Master and a report under Article 4 of the Children (NI) Order 1995 had been directed and received. Also, on 30 June 2009 and, presumably, in an attempt to regularise the proceedings, Sarah had signed a consent to be the next friend of Arthur and Arthur's solicitor had signed a certificate that Sarah had no interest in the cause or matter adverse to that of Arthur.

The account of the stages of these proceedings given by the solicitor for the applicant

[9] I set out the account that has now been given to me by the applicant's solicitor. I do so only for the purpose of being of assistance for the future. I expressly make it clear that the applicant's solicitor has a deserved professional reputation in Town B based on his considerable experience, expertise, courtesy and consideration. There are a number of features of the account which it is now accepted with the benefit of hindsight should have been approached differently and had he been in charge of the case personally from its inception many of the issues identified would not have arisen. I quote from the applicant's solicitor's letter dated 30 September 2009 which I received after arriving at my conclusion on 16 September 2009 that there was no evidence as to the understanding of Arthur and that the non molestation proceedings should be dismissed. The relevant part of the letter is in the following terms:-

- “(a) Sarah and her parents (who also reside in town A) have been known to me for many years.
- (b) In 2000 I acted for Sarah in relation to her divorce from George. The divorce petition which was undefended, was grounded on

George's unreasonable behaviour stemming from There were no issues of domestic violence between the parties.

- (c) On the 22nd September 2008 Sarah attended at my offices and was seen by my assistant. Sarah gave him an account of events on the 10th September 2008 and these were in line with the statement which she later signed on behalf of her son Arthur on the 29th September 2008. My assistant prepared a Legal Aid Application Form (Form App 7) and this was signed by Sarah at the same interview. She also advised that Arthur had been seen by his GP some days after the alleged assault and that he had reported the matter to the PSNI. The following day the PSNI attended on Sarah and Arthur.

Arthur was not present at the initial interview and was at school at the time. Sarah confirmed that she was giving instructions on his behalf and this was accepted by my assistant.

- (d) My assistant submitted to (the) Court Office (in town B) an application for Non-Molestation Order (Ex-Parte) and on the same date submitted an application for Legal Aid to the Legal Service Commission.
- (e) On the 29th September 2008 my assistant attended (the) Magistrates' Court in town B to move the ex-parte application for the non-molestation order on behalf of Arthur. Both Arthur and Sarah attended. In a consultation room in the Courthouse and immediately prior to the hearing the assistant gave Arthur the typed statement which he read through and confirmed its contents to be true. The statement had already been signed by his mother Sarah. The assistant then attended before the District Judge in Chambers. On reading the papers and being made aware that the plaintiff was a minor and that the alleged incident was the subject of ongoing PSNI investigation the District Judge indicated that

the matter ought to be referred to the High Court.

- (f) On the same date an application for a non-molestation order under the Family Homes and Domestic Violence (NI) Order was prepared and on the following day it was faxed to the Office of Care and Protection with a request that the matter be listed before the Master the following morning. Notification to Parties (Form 3) was also faxed.
- (g) On the 1st October 2008 the Master dealt with the matter. Although application for leave (Form 1) does not appear to have been filed with the office, the Master nevertheless granted leave for the application to proceed ex-parte.
- (h) On the 7th October 2008 a copy of the application for a non-molestation order was furnished to the solicitors for George.
- (i) On the 8th October 2008 Arthur gave a statement of evidence on video to the PSNI.
- (j) On the 11th November 2008 the case was reviewed by the Master.
- (k) On the 13th November 2008 a request was sent to the Social Services requesting a report be furnished pursuant to Article 4 of the Children's (NI) Order 1995 and that consideration be given to welfare and contact issues including Arthur's ascertainable wishes and feelings etc.
- (l) On the 17th January 2009 I received a copy of George's replying affidavit wherein he entirely refuted the contents of the statement of evidence and asserted that - "*Sarah is responsible for the contents of this statement*".
- (m) The case was further reviewed by the Master on the 27th January 2009 and the 28th April 2009. The case was adjourned because of

ongoing PSNI investigations. It was at the latter hearing that George's Counsel drew attention to the fact that no certificates regarding Sarah's suitability to act as next friend had been filed pursuant to Rule 6.2(5)d. The Master gave leave to the applicant to put in a late certificate. This ought to have been filed by my office at the outset of the proceedings but due to an oversight this was not done.

- (n) On the 30th June 2009 I had a face to face meeting with Sarah in my office concerning:
 - (i) any requirements for special measures; and
 - (ii) her suitability to act as next friend.

I was mindful of the potential conflict of interest given the contents of her former husband's affidavit mentioned at paragraph (l) above. I addressed this point with her. At no point during this or any other interview did she express any animosity towards her former husband but merely a determination to get the facts out in the open and have the matter resolved. She gave me the firmest assurances that her only focus was to protect Arthur. She confirmed that the choice to proceed with the case was his and his alone and she reminded me that at the outset he had been unsure of whether he wanted to make a complaint to the PSNI and seek a non-molestation order. However, he had reconsidered and decided to go ahead. Sarah is a strong willed and articulate woman who is very protective of her children. She did not display any animosity towards her former husband and I did not sense that she was using neither Arthur nor the proceedings as some form of "revenge attack" against her former husband. I was also aware of the comments made by the social worker, ... in his report dated 9th March 2009 - "*Sarah would be as stated very protective of Arthur*" and "*however has demonstrated that she has Arthur's best interest at heart and shown emotional warmth*

towards him". Having spoken with Sarah, I formed the same view as the social worker.

On the same date Sarah signed the consent to act as next friend and I also signed the certificate under Rule 6.2(5)d. These were then forwarded to the court office.

- (o) On the 5th August 2009 the case was further reviewed by the Master.
- (p) On the 19th August 2009 the Public Prosecution Service advised that it had decided not to prosecute George in relation to the alleged assault.
- (q) On the 11th September 2009 Junior Counsel's Trial Directions were filed with the Office."

Procedural requirement – Leave to bring proceedings in respect of an applicant under the age of 16

[10] Arthur, being under the age of 16, required the leave of the court under Article 21 of the Family Homes and Domestic Violence (Northern Ireland) Order 1998, to apply for a Non-molestation Order. Leave cannot be granted unless the court is satisfied that Arthur has sufficient understanding to make the proposed application. Thereafter the court must exercise discretion whether to grant leave and in that respect I have set out some of the factors influencing the exercise of the court's discretion in paragraphs [27] and [34] of *RH and Others v IH* [2009] NI FAM 17. In this case there was no evidence before the court as to Arthur's understanding. From the papers grounding the application it was unclear as to whether at any stage Arthur attended his solicitors. I would expect in future applications there to be a statement from the solicitor or other evidence that a child under the age of 16 understands the nature of the proceedings. It is not appropriate to be prescriptive as to the contents of such a statement or the nature of such evidence but ordinarily it would be an essential ingredient that the solicitor has seen the child, that the solicitor has explained the nature of the proceedings to the child, has gone through the matters at paragraphs [27] and [34] of my judgment in the case of *R H and Others v IH* [2009] NI FAM 17 with the child and taken the child's instructions. Care should be taken by the solicitor to ensure that these are the child's instructions and not the instructions of one or other parent who may be intent on bringing proceedings in the name of the child. It is simple to put a child into a

position of conflict with one of his or her parents but more difficult to extricate him or her from that position. It is incumbent on those representing children to ensure that it has been explained to the child that the child's parent can bring proceedings in the parents' name and obtain an order for the benefit of the child. If the child being aware of the ability of his or her parent to bring proceedings in the parent's name and obtain an order for the benefit of the child, still wishes to bring the proceedings in his or her own name, then an explanation should be contained in the evidence presented to the court on the application for leave so that the court can consider that explanation when exercising discretion.

[11] The method of taking instructions from Arthur as set out in his solicitor's account was deficient. He was not seen by a solicitor until after the proceedings had been commenced. None of the steps which I have outlined were taken.

[12] The application for leave to bring proceedings under Article 21 was never made in this case and leave has not been granted. I have considered whether I should grant leave. I refuse to do so on the basis that there is no evidence as to Arthur's understanding.

Procedural requirement - Next friend

[13] In order to apply for leave under Article 21 of the Family Homes and Domestic Violence (Northern Ireland) Order 1998, Arthur is ordinarily required by rule 6.2 of the Family Proceedings Rules NI 1996, to do so by his next friend. The next friend should ordinarily be the Official Solicitor unless there is a written consent filed by some other person and a certificate from the solicitor acting for Arthur that the person named as next friend has no interest in the cause or matter in question adverse to that of the minor and is a proper person to be next friend, see *LA v UJ & RF* [2009] NI Fam 8 and *RH & others v IH* [2009] NI FAM 17. There was no such consent and no such certificate at the commencement of the proceedings. There should have been. Nine months later Arthur's solicitors signed such a certificate but it cannot stand up to any analysis. There is a fundamental conflict between George and Sarah. If Sarah is wrong then her interests conflict with those of Arthur. Even if in the event she is not wrong it is in her interest to establish during the trial process that she is correct and that may not be in the interests of Arthur.

Procedural requirement - Statement

[14] In bringing the application there was a failure to comply with rule 3.16 of the Family Proceedings Rules (Northern Ireland) 1996, in that

there was no signed statement from Arthur. The statement was signed by Sarah as Arthur's next friend. This is not in compliance with the requirement of rule 3.16 and is contrary to the essential concept of a child seeking leave to commence *his or her own proceedings*. Inherent in that concept is a requirement to record the child's evidence in his or her statement and not just to record the evidence of the client's mother. In cases in which a child wishes to bring proceedings in his or her own name the focus should be on the child.

Procedural requirement - ex parte application

[15] Arthur also needed leave to bring the application ex parte under rule 3.17(1) of the Family Proceedings Rules (Northern Ireland) 1996. The circumstances in which an ex parte order should be granted are limited for which see the short summary of the case law at paragraph [16] of *RH & Others v IH* [2009] NI FAM 17. In this case Arthur and George lived in separate towns some not inconsiderable distance apart. The incident, whatever it amounted to, was acknowledged to be an isolated incident. There was no threat of further violence. There had been a period of some 3 weeks between the incident and the ex parte order during which nothing untoward had occurred. There was no evidence as to any incident of domestic violence involving any other family member. At an inter partes hearing the real focus of these proceedings could have been identified in that implicit in the proceedings was an application for a no direct contact order. Amendment of the identity of the parties so that the proceedings were in the name of Sarah and Transfer to the Family Proceedings Court could have been considered.

[16] One of the reasons articulated by the District Judge for indicating that the matter be referred to the High Court apparently was that there was an ongoing police investigation. Overwhelmingly non molestation proceedings continue at the same time as police investigations. Those cases are almost universally conducted in a family proceedings court or in a domestic proceedings court. I do not consider that a police investigation requires that cases to be dealt with in the Family Care Centre or the High Court, see by analogy paragraph 4.9 of "*Allocation of Family Proceedings - Notes for guidance*" which are an appendix to the "*Guide to Case Management in Public Law Proceedings*" which will apply from 1 October 2009.

[17] If an application had been launched for a no direct contact order under Article 8 of the Children (Northern Ireland) Order 1995 either alone or in conjunction with a non molestation application then the court would have been enjoined by Article 3(2) of the Children (Northern Ireland) Order 1995 in respect of the contact proceedings to have regard

to the general principle that any delay is likely to prejudice the welfare of Arthur. Again adopting this procedure in the family proceedings court would have brought greater focus on the need for a prompt disposal of the proceedings.

Procedure - Multiplicity of applications brought by members of the same family

[18] I mention a further procedural matter which did not arise in this case but has arisen in a number of these non molestation applications in the High Court all of which I am presently in the process of reviewing. In some cases and *RH & Others v IH* is an example, all the children and one of the parents have brought separate non molestation applications against the other parent in circumstances where all rights to relief were in respect of or arose out of the same events or series of events. Rule 1.4 of the Family Proceedings Rules (Northern Ireland) 1996 provides that subject to the provisions of those rules and of any statutory provision, the Rules of the Supreme Court (Northern Ireland) 1980 shall apply with the necessary modifications to the commencement of family proceedings in, and to the practice and procedure in family proceedings pending in, the High Court. Order 15 rule 4 of the Rules of the Supreme Court (Northern Ireland) 1980 with the necessary modifications allows for the joinder of all such applicants in the one set of proceedings. Multiplicity of proceedings should not ordinarily occur. In any case in which multiple proceedings have been commenced then consideration should be given to amending one of the proceedings to include all the applicants and the other proceedings being dismissed without adjudication on the merits and without prejudice to the ongoing proceedings or alternatively to the consolidation of the proceedings.

The parties' suggested disposal of the non molestation proceedings

[19] The Master listed the matter for a first review before myself on 16 September 2009 and in advance had drawn the parties' attention to the decision in *RH & Orders v IH* [2009] NI FAM 17. At that review I was informed that George was prepared to give an undertaking that he would not seek direct contact with Arthur except with Arthur's consent. That provided such an undertaking was given Arthur, by his next friend, Sarah, would consent to the non-molestation proceedings being dismissed. In effect, there would be a no-direct contact order.

[20] The issue of contact had always been an implicit component of these non-molestation proceedings. If a non-molestation application had been brought by Sarah in the Family Proceedings court seeking an order protecting Arthur, and at the same time an application for a no-direct

contact order had been made, then what was implicit in the non-molestation application in the High Court would have become explicit in the proceedings in the Family Proceedings Court. The focus of those proceedings in the Family Proceedings Court would then have changed. The no-contact application would have been case managed and decided on the basis that the court's paramount consideration was Arthur's welfare in accordance with the welfare checklist in Article 3(3) of the Children (Northern Ireland) Order 1995. The court would have been giving active consideration to issues such as supervised direct contact, anger management, and on the facts of this case contact with Arthur's paternal grandfather, the relationship with whom had been broken by the incident on 10 September 2008. Arthur previously enjoyed his relationship with his grandfather; there had never been any question of violence, physical or emotional, in it. No reason was given to me as to why attempts should not have been made at the very least to repair that relationship.

Conclusion

[21] I declined to implement the parties suggested method of disposal of the case on the basis that I was concerned as to whether Sarah and George had given appropriate consideration to the welfare checklist in Article 3(3) of the Children (Northern Ireland) Order 1995 in arriving at a decision that in effect there should be a no-direct contact order between George and Arthur. Furthermore there had been no attempt to repair Arthur's relationship with his paternal grandfather, there never having been any reason why Arthur should not have the benefit of contact with him.

[22] I adjourned the matter on the basis that there should be negotiations between Sarah and George for consideration by the court as to appropriate contact arrangements, whether direct, (supervised or unsupervised) or indirect. That the negotiations should be on the basis of the paramount consideration being Arthur's welfare. I made it clear that on the adjourned hearing I would dismiss the non molestation application on the ground that there was no evidence as to Arthur's understanding.