

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

**Caitrin, Dona and Elliot (pseudonyms) (No 2) (Freezing Injunction:
Application to discharge or vary)**

STEPHENS J

Introduction

[1] On 8 January 2010, under citation [2010] NIFam 1, I gave judgment in relation to a fact finding hearing in respect of care proceedings brought by a Trust in respect of three children whom I called Caitrin, Dona and Elliot though those are not their real names. At paragraphs [45]-[53] of that judgment I summarised the position in relation to the private law proceedings between the children's parents. At paragraph [17] of that judgment I referred to a discovery order made against the mother and father in relation to their assets and to a freezing injunction against the father to secure his assets pending an application by the mother for financial provision for the children under Article 15(1) and schedule 1 of the Children (Northern Ireland) Order 1995.

[2] This judgment concerns an application by the children's father to vary or discharge the order dated 15 December 2009 granting a freezing injunction restraining him from disposing of his property including monies held in an off shore bank account.

[3] I anonymise this judgment in the same manner as the judgment delivered on 8 January 2010. The names used are not the real names of any of the individuals. Nothing should be reported which would identify any of the children or any member of their extended family. Any report of this judgment should make it known that the names used are not the real names of any of the individuals. Accordingly in this judgment I refer to:

- (a) The children, two girls and a boy, as **Caitrin, Dona** and **Elliot**.
- (b) The father as **Fergus**.

- (c) The mother as **Marcail**.
- (d) The country of which Fergus, Marcail, Caitrin, Dona and Elliot are nationals as country ~A~.

Though there is some logic to the choice of the pseudonyms they are primarily chosen at random. Prior to publication of my judgment dated 8 January 2010 on the Court Service website I afforded the parties the opportunity of considering the pseudonyms and if they considered them inappropriate to suggest alternatives.

[4] 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the Office of Care and Protection in writing within one week as to whether there is any reason why the judgment should not be published on the Court Service website or as to whether it requires any further anonymisation prior to publication.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.

[5] In my judgment dated 8 January 2010 I recorded that the father was for the majority of the proceedings a litigant in person. He has obtained legal representation in respect of the public law proceedings with Mr Ferris QC and Miss Hannigan being instructed on his behalf. He is still a litigant in person in relation to the private law proceedings in respect of which the freezing injunction was granted. Ms McGreenera Q.C. and Ms Niamh Devlin appear on behalf of the mother.

[6] In paragraph [4] of my judgment delivered on 8 January 2010 I specifically drew to the parties' attention the question as to Caitrin, Dona and Elliot having access to that judgment. As a postscript to that judgment I record that in the event, having heard submissions and having obtained expert evidence, I decided that Elliot who is 8 should be informed in very general terms. In relation to Caitrin and Dona, who wished to see the judgment in full, it was stated to be a vital part of their therapeutic work to be taken through it. I accordingly decided to make an unanonymised version of the judgment available to the solicitor for Caitrin and Dona so that when they read it the correct names of all the individuals were included. I gave directions as to the safekeeping of any unanonymised copies so that they were kept secure and when they had been considered, destroyed.

[7] All references in this judgment to dollars are to United States dollars.

The grounds upon which the application to discharge or vary the freezing injunction is based and the grounds of opposition to the application

[8] The application to discharge or vary the freezing injunction is made on two fundamental grounds. The first ground is that the money in one of Fergus' bank accounts belongs to his brother and the money in another belongs to his

father. Accordingly that the money in those bank accounts should be released to those individuals. Fergus also contends that he owes his father \$22,000 and he should be allowed to discharge this debt particularly given his father's ill health and financial need. The second ground is that even if on the balance of probabilities on the present state of the evidence the monies in these accounts are not owned by his brother or father or even if the court is not persuaded that he owes or still owes his father \$22,000, that Fergus should be allowed to expend monies in payment of his mother's funeral expenses and on the nursing, medical and housing needs of his father.

[9] Marcail opposes the application on a number of grounds. She asserts that all the monies in these accounts belong to Fergus and so far as the amounts are presently known they are well within the financial abilities of Fergus to have accumulated given his employment record and his attitude to family finances set out in my judgment dated 8 January 2010. She accordingly disputes that any of the money in the bank accounts is in fact owned by Fergus' brother or father or that Fergus owes any debt to his father. She questions the amount spent on Fergus' mother's funeral and the medical and financial needs of Fergus' father. Furthermore she states that even if a need is established Fergus' primary obligation is to his children and that absent an order there is not only a real risk, but in her submission a certainty, that any order for the support of the children would be unsatisfied.

Legal principles

[10] The application for a freezing injunction was made under the inherent jurisdiction of the court see *Shipman v Shipman* [1991]1 FLR 250 and *Injunctions 10th edition by David Bean* at page 200 - 201. I was not addressed in relation to the legal principles. I do not intend to rehearse all the relevant legal principles save to say that a freezing injunction is a remedy which exists for the purpose of restraining an individual potentially liable to make a payment on foot of a court order from the abuse of dissipating or hiding assets that might lawfully attach for the purpose of satisfying the order likely to be given. Assets up to a value sufficient to satisfy the claim by Marcail on behalf of the children may be frozen where it appears to the court to be just and convenient to so do. At this stage it is not possible to say what is the likely order to be given. For instance, amongst other factors, Fergus has not revealed the amounts in his name in his off shore bank account.

[11] Where there is a dispute as to the ownership of assets and it appears that the assets belong to a third party they should not be included in the scope of the injunction without evidence that the assets are in this case Fergus'. However the mere assertion of an individual that a third party owns the assets need not be accepted without inquiry and the court must do its best to do what is just and convenient between all concerned.

[12] A court should not vary or discharge an order to facilitate either directly or indirectly an illegal payment whether it be in the United Kingdom or in any other country, including, of course, country ~A~.

[13] I have not heard submissions as to the burden of proof in relation to this application. The approach that I adopt is that the burden is on the applicant for a freezing injunction, in this case Marcaïl, to establish on the balance of probabilities that the assets are the assets of the person against whom the order has been granted, in this case Fergus. Accordingly in relation to the first ground the burden is on Marcaïl. In relation to the second ground where an individual is applying on the basis of need to discharge or vary a freezing injunction it is incumbent on the person asserting the need, in this case Fergus, to establish both the existence of and the amount of the need. If need is established then it is on the person applying for the freezing injunction, in this case Marcaïl, to persuade that it is just and convenient to maintain the order.

The bank accounts

[14] The order granting a freezing injunction is dated 15 December 2009. On 18 December 2009 Fergus signed a statement disclosing some details in relation to four bank accounts or groups of bank accounts. In order to maintain the security of those accounts I will not identify the banks, all of which are incorporated in the United Kingdom or the Republic of Ireland or the account numbers. All the accounts were opened by Fergus and are in his name. The accounts are as follows:-

- (a) An account with bank A containing approximately £3,000 ("account A").
- (b) Accounts with bank B containing approximately £20,500. (I refer to this group of accounts as "account B".)
- (c) An account with bank B international. This is the off shore account. Fergus states that \$5,000 in that account belonged to him with the balance belonging to this brother. The total in the account was not and indeed still has not been disclosed. ("account B international".)
- (d) An account with bank C containing approximately £29,500 which Fergus states belongs to his father ("account C").

In addition Fergus states that he owes his father \$27,000 now reduced to \$22,000, which was a loan from his father to facilitate the purchase by Fergus of a flat in country ~A~.

[15] An email dated 18 December 2009 from Fergus' brother was attached to the statement dated 18 December 2009. In that email Fergus' brother who resides in country ~A~ stated that:-

- (a) Fergus had at his request opened a US dollar account in the name of Fergus in bank B international "for saving our money". That Fergus' share in this account is \$5,000. That the account is operated by Fergus' brother "on their behalf."
- (b) Fergus had also opened an account in the United Kingdom on behalf of Fergus' father. Fergus' brother did not identify the account but Fergus asserts that it is account C. Fergus' brother went on to state that Fergus "operates solely money of our father in the sum of about £30,000". He confirms that the money is the property of his father.
- (c) Fergus owes his father \$27,000 for purchasing property in country ~A~ in 1997.

Finally Fergus' brother states that "the above financial arrangements are made inside our family and based on full mutual trust". No vouching documents were provided to support these propositions.

[16] In an affidavit sworn on 27 January 2010 Fergus provided details of his taxable pay as £25,826.22 for the year to date with his net pay for the most recent month being £2,140.44. He had continued to receive child benefit despite the fact that the children were not in his care as from 5 October 2009. He indicated that he had tried to stop these payments and was happy to repay the amounts "once this matter had been resolved by the responsible government agency".

[17] In the affidavit sworn on 27 January 2010 Fergus also deals with the bank accounts in his name. I will summarise the position set out by Fergus in relation to each account or group of accounts.

[18] In relation to account A Fergus exhibited an account summary showing a credit balance of £5,231.46. It is apparent from that account summary that his

earnings for December 2009 were credited to that account. No bank statements were produced by Fergus.

[19] In relation to account B which is a group of accounts he stated that the balance in all the accounts amounted to £20,608.65. Again there were no bank statements.

[20] In relation to account B international he stated that this account was opened on behalf of his brother, that he did not retain the log in details or account number, that he had \$5,000 in the account but the full balance now belongs to his brother. That "my brother has spent a sum of \$5,000 on my behalf to assist with urgent repairs to my parents' dwelling". That his brother now treats the whole of the monies in account B international as belonging to him but that Fergus' debt to his father of \$27,000 is reduced by the amount of \$5,000 to \$22,000. No bank statements were produced in relation to account B international.

[21] In the affidavit Fergus gives further information about the debt of \$27,000 to his father. It is recollected that Fergus' brother states that this debt was incurred in relation to the purchase of a flat in country A in 1997. Fergus states that it was purchased for \$30,000 with a loan from his father of \$27,000 though for the reasons I have just set out he now says the amount owed is \$22,000. There were no documents attached to this affidavit either in relation to the purchase of the flat in 1997 or to the loan or as to the source of the sum of \$27,000 stated to have been lent by Fergus' father to Fergus. Fergus states that the property is not rented and that he does not receive an income from it.

[22] In relation to account C Fergus states that he opened this account at the request of his father and all the money deposited in the account belonged to him. He exhibited a printout showing that as at 9.44 pm on 17 December 2009 the amount to the credit of the account was £29,419.52. No documents were exhibited to the affidavit to determine how the account was operated, for instance to illustrate by whom, in what amount and upon what dates the lodgments were made, by whom, in what amount and upon what dates the withdrawals were made from the account and upon what date the account was opened. No bank statements were produced in relation to account C.

[23] On 21 January 2010 I made orders under the Bankers Books Evidence Act 1879 in relation to banks accounts A, B, B international and C. Statements have been produced by the banks in respect of accounts A and B. No statements have as yet been produced in relation to account B international and account C.

[24] Fergus' brother will not release any of the statements in relation to account B international and Fergus states that he does not have the log in or account number for that account. At present in the absence of such documents

it is not possible to carry out a complete analysis of the various accounts nor is it possible to say how much money is held in Fergus' name in account B international.

[25] In summary Fergus whilst recognising that all the accounts are in his name states that the only money in the various accounts belonging to him is as follows:-

- (a) Account A balance as at 19 January 2010 - £5,189.46.
- (b) Account B - £20,608.65.

The total in sterling is £25,798.11 but Fergus states that he still owes his father \$22,000.

Ownership of monies in account B international

[26] The evidence upon which Marcail relies to establish that the money in Account B international belongs to Fergus is that the account is in the name of Fergus and the amount, in so far as it is known being some \$5,000, is well within the financial abilities of Fergus to have accumulated given his employment record and his attitude to family finances set out in my judgment dated 8 January 2010. I have set out the evidence of Fergus and his brother. I consider that evidence to be lacking in particularity and that it is not properly supported by vouching documents. Fergus and his brother have not made available statements in relation to this account to show how it was operated. No document has been produced by Fergus' brother to support his contention that he made the deposits to that account. There are no details as to the earnings of Fergus' brother or as to the source of the money that he states he deposited in this account. There are no tax returns from Fergus' brother disclosing his income or disclosing any interest earned on this account. There are no details as to whether the money was deposited in cash or by way of a cheque or by an electronic transfer. On the present evidence and for the purposes of interlocutory relief I consider that the amounts in this account, so far as they are known, belong to Fergus. I emphasise that this is a provisional view based on the evidence presently available to me.

Ownership of monies in account C

[27] Again the evidence upon which Marcail relies to establish that the money in account C belongs to Fergus is that the account is in the name of Fergus and the amount, in so far as it is known being some £29,419.52, is well within the financial abilities of Fergus to have accumulated given his employment record and his attitude to family finances set out in my judgment dated 8 January 2010. Fergus has given a greater degree of detail as to how his

father's monies came to be in that account. He has informed me that his father, who does not trust banks in country ~A~, would give him cash when he was in country ~A~ in either dollars or the currency of country ~A~. That Fergus would then in country ~A~ convert that cash into sterling, again in cash. The conversion would be carried out in such a way that Fergus was left with a round figure in cash in sterling. After that rounding exercise he would give any surplus currency of country ~A~ or dollars back to his father, again in cash. Fergus would then take back to the United Kingdom the round figure in cash in sterling. Fergus would not make any record of this transaction but would be able to remember the round figure upon his arrival in the United Kingdom. However rather than directly depositing the cash in account C he would use the cash for household expenses so that he was then able to lodge or to transfer the whole of or the vast majority of his income to account C. He asserts that the monies in account C therefore belong to his father. He emphasises that the monies given to him in country ~A~ by his father was not a loan but rather it was to be lodged by him to his father's account. Fergus has not given the dates upon which his father gave cash to him in country ~A~ nor has he stated when account C was opened.

[28] I have not heard any submissions as to whether if Fergus' explanation as to what occurred is correct it can be said legally that the monies belong to Fergus' father. I do not base my decision on any such analysis.

[29] I consider that evidence upon which Fergus relies to establish that the money in account C belongs to his father to be lacking in particularity and that it is not properly supported by vouching documents. Fergus and his father have not made available the statements in relation to this account to show how it was operated. Fergus kept no records of any of these cash transactions. He is unaware of his father having kept any record. There has been no document created or produced by either of them as to these transactions between them. No evidence has been given as to the source of this cash in country ~A~. There are no details as to the earnings of Fergus' father. There are no tax returns. On the present evidence and for the purposes of interlocutory relief I consider that the amounts in this account belong to Fergus. I emphasise that this is a provisional view based on the evidence presently available to me.

Alleged debt of \$27,000 now \$22,000

[30] A document in Fergus' handwriting has been produced which translated states:-

"I am . . . by this confirm that I am indebted 27,000
(twenty seven thousand) dollars of USA to my father .
. . and undertake to return them by the first his query.

27/6/97".

It is then signed by Fergus. There was no information as to where that document was found or how it came to be signed. It was not witnessed. It is handwritten on un-headed notepaper which appears to have been torn out of a notebook. There are no documents in relation to the associated transaction. There is no debit from an account in the name of Fergus' father in the amount of \$27,000. There are no details in relation to the source of those monies. There are no details as to the earnings of Fergus' father before he retired or indeed as to when he retired. There are no details as to when he acquired the sums in cash and for how long where and with whom he kept them. It is now apparent that Fergus' father is not in good health and an inference is available that Fergus' father and mother would have needed some financial assistance for a number of years. This purports to be a loan made in June 1997 and over 12 ½ years since no explanation has been given as to whether any loan repayments were requested and if not why not. Similarly during this period Fergus' father may have been giving him sums in cash in country ~A~ to take to Northern Ireland and to deposit in an account from which on the present information available to this court no payments were made from the account back to Fergus' father to defray his increasing medical and care needs. On the basis of these reasons both individually and cumulatively I am not presently persuaded that the sum of \$27,000 was lent or if it was that the amount of \$22,000 or any sum is still outstanding.

[31] In conclusion on the present state of the evidence I decline to vary the freezing injunction on the basis that any of the monies are owned by Fergus' brother or father or that Fergus owes his father \$22,000.

Variation application on the ground of financial need

[32] Fergus' mother who resided in country ~A~ unfortunately died on Saturday 13 February 2010. She was buried in country ~A~ on either Monday 15 February 2010 or Tuesday 16 February 2010. Fergus wishes to use monies frozen by the freezing injunction in payment of funeral costs and also to support his father.

Funeral expenses

[33] Fergus' mother has been buried in a cemetery in a city centre in country ~A~ in which many of her relatives have been buried. Fergus' father and the extended family wish to secure a plot for Fergus' father so that in the event of his death he can be buried beside or close to his wife. Fergus has explained that the cemetery is closed due to the shortage of land. Fergus' family do not have a mausoleum and his mother was buried in a plot in the cemetery. In order for a burial in a plot to occur or for a plot to be reserved "unofficial payments" have to be made. Fergus states that to reserve a plot for his father would cost an "unofficial payment" of between \$6,000 and

\$8,500. The payments are in cash and in the circumstances of these “unofficial payments” it is not possible to obtain a receipt. In addition in order to gain access to the cemetery to bring “a coffin to a tomb” it is necessary to dismantle a fence.

[34] Some details as to the cost of Fergus’ mother’s funeral and the cost of reserving a plot for Fergus’ father have been set out in an email dated 15 February 2010 from Fergus’ brother. I set out the costs together with the explanations that have been given to me by Fergus:-

- (a) Approximately \$10,000. This cost includes the “unofficial payment” of a figure between \$6,000 and \$8,500 to secure a plot for Fergus’ mother and the cost of dismantling the fence to gain access to the cemetery. Fergus states that he is unable to obtain any receipts or any breakdown in relation to these sums.
- (b) \$10,000-\$18,000 for a granite or marble memorial. Fergus believes that the firm engaged will not give a quotation for the memorial.
- (c) \$6,000-\$8,500 as, according to Fergus’ description, an “unofficial payment” to secure a plot for his father.

The total cost and the amount which Fergus seeks to be released from his bank accounts is therefore between \$26,000-\$36,500. All this to be spent on these items and none of it to be spent on repairing Fergus’ father’s apartment or his medical care. It is recalled that the total amount which Fergus states that he has in his bank accounts and which he owns amounts to £25,798.11.

[35] I was also informed by Fergus that his brother has already paid \$8,000 towards these costs and that his brother had borrowed this amount. Fergus did not know from whom he had borrowed it.

[36] Lacking any independent verification of any of these figures it was suggested to me that enquiries could be made of the British Embassy in country ~A~ or alternatively of the Consul for country ~A~. Fergus did not wish to avail of this opportunity.

[37] Fergus has established a need for some assistance to be given towards funeral expenses but on the present evidence I do not accept that the amounts involved are correct. Also on the present evidence I do not accept that other family finances are not available. I would not in any event countenance a payment which directly or indirectly facilitated an “unofficial payment” in country ~A~. I consider that there is a real risk absent a freezing injunction that any order for the support of the children would not be satisfied by Fergus.

In the exercise of my discretion I consider it just and convenient to maintain the order rather than to countenance expenditure that would potentially leave the children financially bereft in this jurisdiction.

Medical and other needs of Fergus' father

[38] Fergus' father does not enjoy good health. He is stated to require nursing care and medicines, the costs of which will be \$1,000 per month. It is also stated that his apartment is not fit for habitation and will cost \$20,000 to repair. A quotation has been provided to the court in relation to these repair costs.

[39] Fergus states that his father is without financial resource and that his extended family are unable to provide financial support for him. Fergus goes on to add that the extended family have enough means to support his children if they return to country ~A~. There was no attempt to explain why the extended family had resources to support the children but had no resources to support his father. For instance no details have been given to the court as to the earnings or capital resources of Fergus' brother or sister.

[40] Ms McGreenera, on behalf of Marcail questions the assertions that Fergus' father is without financial resource and that the extended family is unable to provide financial support for him on the basis of a statement dated 16 October 2009 filed by Fergus in support of an application to relocate the children to country ~A~. In that statement Fergus recounted:-

“My extended family (are nationals of country ~A~) and we miss not being able to see them as frequently as we would like. I have elderly parents who are living in a very large flat and who receive the state pension. My brother, whom I am particularly close to, also lives in (a city in country ~A~) in a large flat with his family and my sister lives in a private house with her family”.

At paragraph 8 he stated:-

“My larger family has significant financial means to support us if we require it when we initially move. My father is famous in (a city in country ~A~) as a ... and he is quite wealthy and will be happy to support me and his grandchildren if necessary.” (emphasis added)

[41] Fergus has not addressed the assertion that his larger family has significant financial means but now states that his assertion that his father is

quite wealthy was based purely on the debt of \$27,000 then owed by him to his father and the sum of approximately £30,000 in account C. That apart from these sums his father is without financial resources. This information was available to Fergus on 16 October 2009 but he did not make it available to the court so that the court could determine the extent of Fergus' father's wealth and the other demands that could be anticipated would be made on those resources by his parents and therefore what if any resources would be available to support Fergus and the children if they relocated to country ~A~.

[42] There is no medical report as to the present condition of Fergus' father or as to his needs. There are no details as to the public provision of medical care and assistance or as to the housing and care facilities available at public expense in country ~A~ for the elderly. The question as to whether Fergus' father could live in Fergus' flat in country ~A~ or with Fergus' brother or sister has not been addressed nor has the question as to whether it is economically prudent to sell his father's apartment and use the proceeds to purchase other accommodation.

[43] Fergus has established a need for some assistance to be given towards the support of his father but I am entirely unpersuaded as to the amounts involved or as to the lack of other family finances or alternative solutions. Even if Fergus had established that level of expenditure in relation to the proposed level of support for his father then this would entirely consume his available cash so that nothing would be available for the support of his children. In the exercise of my discretion I would refuse his application on that ground also.

Conclusion

[44] I refuse to discharge or vary the freezing injunction. It is open to Fergus at any stage to bring further evidence before the court and to make a further application. I have stated and now emphasise in a general way that the factual conclusions are provisional based on the present evidence.